CLERK'S COPY 1534

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 122.

THE CARY MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ACME FLEXIBLE CLASP COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 26, 1901.

(18,209.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 25, 1902.

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a United States Circuit Court of Appeals for the Second Circuit.

THE CARY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
THE ACME FLEXIBLE CLASP COMPANY, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Feb. 4 1901. William Parkin, clerk.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between The Cary Manufacturing Company, plaintiff in error, and The Acme Flexible Clasp Company, defendant in error, in which it is said an order and judgment was rendered May 28", 1901, affirming a judgment of the circuit court of the United States for the southern district of New York, entered November 16th, 1900; a manifest error hath happened, to the great damage of the said Cary Manufacturing Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

c [Endorsed:] United States Supreme Court. Cary Manufacturing Company against Acme Flexible Clasp Company Writ of error A. G. N. Vermilya, attorney for Cary Mfg. Co., Temple court, 5 & 7 Beekman St., New York city. Service of a copy is hereby admitted. May 31, 1901. William A. Redding, attorney for deft in error. United States circuit court of appeals, second circuit. Orig. filed May 31, 1901. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The Acme Flexible Clasp Company, complainant defendant in error, and The Cary Manufacturing Company, defendant plaintiff in error, in which it is said a judgment was rendered November 16th, 1900, a manifest error hath happened, to the great damage of the said Cary Manufacturing Company, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the judges of of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 22d day of January, A. D. 1901, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this tenth day of January in the year of our Lord one thousand nine hundred and one and
2 of the Independence of the United States the one hundred and twenty-fifth.

JOHN A. SHIELDS,

[SEAL.] *Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second

circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to forty-three inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Cary Manufacturing Company, plaintiff in error, against Acme Flexible Clasp Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-first day of January in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

(Endorsed:) The U. S. circuit court of appeals for the second circuit.—Cary Manufacturing Company, plaintiff in error, *vs.* Acme Flexible Clasp Company, defendant in error.—Writ of error.—A. G. N. Vermilya, attorney for plaintiff in error.—Due service of a copy of the within writ of error is hereby admitted this 10th day of Jan'y, 1901, and also of the bond and the assignment of errors. Wm. A. Redding, attorney for defendant in error.—U. S. circuit court.—Filed Jan. 10, 1901.—John A. Shields, clerk.

3 In the Circuit Court of the United States for the Southern District of New York.

ACME FLEXIBLE CLASP COMPANY
vs.
CARY MANUFACTURING COMPANY. } In Equity. No. 6767.

The President of the United States of America to Cary Manufacturing Company, its officers, directors, servants, employees, operators, and workmen, Greeting:

Whereas, it has been represented to us in our circuit court of the United States for the southern district of New York, in the second circuit, that letters patent No. 314,204, granted March 17, 1885, to W. O. Swett, assignor to the complainant herein, for improvements in staple-fasteners for wooden vessels, are in all respects good and valid in law; that the title of said letters patent is in the complainant as alleged in the bill of complaint; that said W. O. Swett was the original and first inventor of the improvements described and claimed in said letters patent, and that the defendant has infringed said letters patent No 314,204, and upon the exclusive right of the complainant under the same by the manufacture, sale or use of one or more staple-fasteners employing or embodying the construction set forth in letters patent of the United States No. 585,021 granted to S. C. Cary, June 22, 1897.

4 Now, therefore, we do strictly command and enjoin yo
the said Cary Manufacturing Company, your officers, direc
ors, servants, employees, agents, operatives and workmen, durin
the unexpired term of said patent, from directly or indirectl
making, constructing, using or vending to others to be used, stapl
fasteners constructed and operated in the manner and upon th
principles described and claimed in said United States letters pate
No. 314,204, granted March 17, 1885, and particularly from manu
facturing, using or vending to others to be used, a fastener for secu
ing wooden package covers formed of a single piece of metal wit
tempered shanks and a thin metal plate which is thick enough
its junction with the base of the shank to form heads for drivin
the shanks in the wood as set forth in the claim of said letters pate
No. 314,204.

Witness the Honorable Melville W. Fuller, Chief Justice of th
United States, this 29th day of December, 1899, and in the one hun
dred and twenty-fourth year of the Independence of the Unite
States of America.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York.—
In equity.—Acme Flexible Clasp Company *vs.* Cary Manufacturin
Company.—Injunction.—Redding, Kiddle & Greeley, counsellors-a
law, 38 Park row, Potter bldg., New York, N. Y.

I hereby certify, that on the 3rd day of January, 1900, at the city
New York, in my district, I served the within injunction upon th
within-named Cary Manufacturing Company by exhibiting
Spencer C. Cary, as president of said company, the within origina
and at the same time leaving with him a copy thereof. Wm. Henke
United States marshal, southern district of New York.—Dated Ja
3, 1900. U. S. circuit court.—Filed Jan. 3, 1900.—John A. Shield
clerk.

5 United States Circuit Court, Southern District of New Yor

ACME FLEXIBLE CLASP COMPANY
vs.
CARY MANUFACTURING COMPANY.

Notice.

A. G. N. Vermilya, Esq., Temple court, New York city, solicitor f
defendant.

SIR: Please take notice that on the accompanying motion an
affidavits, copies of which are hereto annexed and herewith serve
upon you, I shall move this court, before his honor, Judge Lacomb
at the court-room of said court, in the Post-office building, in th
borough of Manhattan, city and State of New York, on Friday, N
vember 2, 1900, at 10.30 o'clock in the forenoon of that day, or a
soon thereafter as counsel may be heard, for an order to commit an
punish the defendant, its officers, employees, agents and attorney

for contempt for violating the order of injunction of this court made and issued herein on the 29th day of December, 1899.

Dated New York, N. Y., October 27, A. D. 1900.

W. A. REDDING,
Solicitor for Complainant.

Service of the above notice, and of a copy of the above-mentioned motion and accompanying affidavits, is hereby acknowledged, this 27th day of October, A. D. 1900.

A. G. N. VERMILYA,
Solicitor for Defendant.

6 United States Circuit Court, Southern District of New York.

ACME FLEXIBLE CLASP COMPANY
vs.
CARY MANUFACTURING COMPANY.

Notice.

The complainant moves the court that an order be made and issued in the above-entitled cause to commit and punish the defendant, its officers, employees, attorneys and agents, for contempt of court for violating the injunction of this court made and issued herein on the 29th day of December, 1899; the affidavits of Webster J. Mott and James E. McMurray being presented herewith in support of said motion.

In the Circuit Court of the United States for the Southern District of New York.

ACME FLEXIBLE CLASP COMPANY
vs.
CARY MANUFACTURING COMPANY.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Webster J. Mott, being duly sworn, on oath states as follows:

7 That he is a resident of the city of Rutherford, N. J., in the district aforesaid, and that he carries on business at No. 109 Warren street, as a wholesale dealer in wire and cut nails, tacks, crate hooks and wire, white and manilla tissue, and strawfruit paper, box paper, &c., cordage, twine, &c., and has been engaged in business in this manner for a long period. Affiant states that as part of his business aforesaid he has bought, used and sold large quantities of so-called staple-fasteners for wooden boxes, and that he has bought staple-fasteners of this character from the Acme Flexible Clasp Company of Chicago, Illinois, and also from the Cary Manufacturing Company of New York.

Affiant states that he has long been acquainted with Cary Manufacturing Company, having its place of business at Nos. 19 and 21 Roosevelt street, in the city of New York, and, by reason of this business relation he has been, and is, acquainted with certain employees of Cary Manufacturing Company, and with one of said employees, James C. Battell, who is a salesman and solicitor of orders employed by said Cary Manufacturing Company.

Affiant states that in the latter part of the month of September he was visited at his place of business by said James C. Battell, who solicited from affiant an order for various articles, among them an alleged new form of staple-fastener for wooden vessels, showing affiant at the time a sample of said staple-fastener. The said Battell left with affiant a postal card having the address of Cary Manufacturing Company printed thereon, and showing on its opposite side in red ink, cuts illustrating the various forms of manufacture of Cary Manufacturing Company, said postal card being hereto attached and marked "Exhibit A."

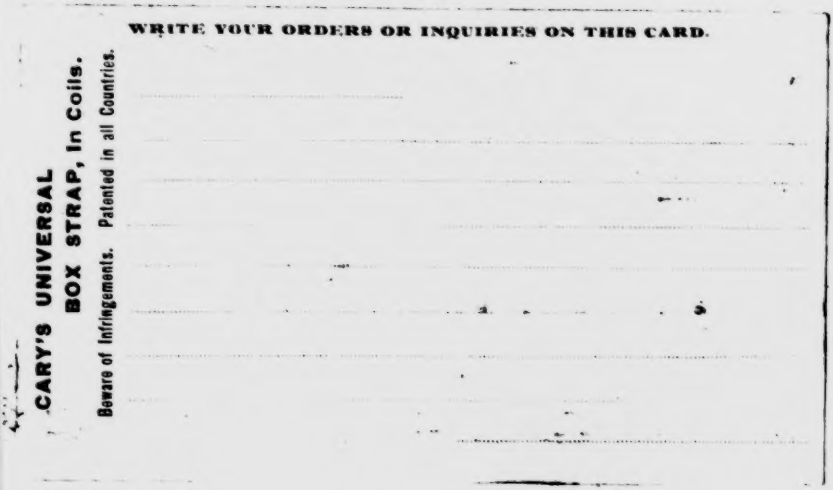
Affiant states that he gave no order to said James C. Battell at the time here named for such staple-fasteners, but subsequently, to wit, on the 26th day of September, 1900, he sent to Cary Manufacturing Company a written order for one hundred pounds of staple-fasteners of the kind shown to him by said Battell, said order being
8 sent to said Battell for delivery to Cary Manufacturing Company. Affiant states that said order was received and accepted and in due course was filled, and that there was delivered to him by said Cary Manufacturing Company on the 29th day of September, 1900, a box containing one hundred pounds of said staple-fasteners, a bill therefor being rendered as usual in such cases. Affiant states that the two staple-fasteners hereto attached and marked "Exhibit B" are part of the said one hundred pounds of staple-fasteners ordered by him as hereinabove stated and shipped to him as herein explained.

Affiant further states that he has, in the past, bought large quantities of the Acme flexible clasp, manufactured by the Acme Flexible Clasp Company, of Chicago, and that, as an extensive user and dealer in this class of articles, he states that the clasp like Exhibit B, hereto attached, does not materially differ from the Acme clasp, the patent on which, he understands, was sustained by the court in the southern district of New York. Affiant states that these two forms of clasp have in common the rigid driving points, the driving head at the points, and a web or bar, thin, so as to be flexible relative to the driving points, whereby, after one point has been driven into the box the staple may be easily bent over a corner and the other point driven in, the flexibility of the web or bar being such that the same is not readily displaced in the use of the package fastened therewith.

Affiant states that he frankly advised the Acme Flexible Clasp Company of his purchase, as he had no intention of invading the rights of the Acme Flexible Clasp Company.

WEBSTER J. MOTT.

Exhibit A.


CARY'S UNIVERSAL
BOX STRAP, In Coils.
Beware of Infringements. Patented in all Countries.
WRITE YOUR ORDERS OR INQUIRIES ON THIS CARD.

No 122.
Cary Mfg. Co.
v.
Acme Flexible
Glass Co. } S.9

[Illustrations on card illegible. See original.]

Subscribed and sworn to before me this twenty-fourth day of October, 1900.

ROSWELL A. NICHOLS,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. and West. Cos.

(Here follows diagram marked page 9.)

10 United States Circuit Court, Southern District of New York.

ACME FLEXIBLE CLASP COMPANY
vs.
CARY MANUFACTURING COMPANY.

CITY OF NEW YORK,
State and County of New York, } *ss:*

James E. MacMurray, being duly sworn on oath, states: That he is the treasurer of Acme Flexible Clasp Company and lives in Chicago, Illinois. Affiant states that notwithstanding the injunction issued by the court in the above-entitled cause, the defendant has continued to advertise and offer for sale staple-fasteners for wooden boxes employing and embodying the invention as set forth in the complainant's patent sued upon and the exact details of construction specifically set forth in the injunction of this court. Affiant states that the advertisement of the defendant company advertising the split clasp which was held by this court to infringe complainant's patent has appeared regularly in the trade journals as indicated, for instance, in the trade journal attached to this affidavit and marked Exhibit C, on page 15. Affiant states that the advertisement was published after the date of the injunction herein, to wit: on October 10, 1900.

Affiant states that the complainant has trade throughout the United States, and that affiant has, as an officer of said company, repeatedly been informed by customers that Cary Manufacturing Company continues to offer for sale staple-fasteners for wooden boxes exactly embodying the structure specifically described in the writ of injunction of this court in this cause issued; but affiant
11 states that the said customers declined to execute affidavits or give voluntary testimony because of the disinclination to become mixed up with the present litigation.

Affiant states that he has lately become cognizant of the fact that Cary Manufacturing Company is manufacturing, selling and offering for sale staple-fasteners for wooden boxes and pails in all details exactly in accordance with the claim in complainant's patent and in exact accordance with the specific description of the staple-fastener, the manufacture and sale of which is particularly enjoined in the writ of injunction in this cause issued. Said staple-fastener was made, sold and offered for sale by the defendant, having in addition to each and all of the essential and particular elements so described,

the additional and utterly immaterial one that the web or body of the staple is made very slightly concave-convex. The giving of this shape to the body or web, as now manufactured by Cary Manufacturing Company, in no manner or way whatsoever changes the functions and properties of the said staple-fastener.

Affiant attaches hereto and identifies as Exhibit D, staple-fasteners which were delivered to him by W. R. Rogers, sales agent for Cary Manufacturing Company at Baltimore, Maryland, on Saturday, October 20, 1900, at his (Rogers') office, in Baltimore, Maryland. Said Rogers then and there informed affiant that he received these clasps from Cary Manufacturing Company, together with instructions from Cary Manufacturing Company to take orders for and sell these clasps for them That these instructions and samples were received by him, said Rogers, from Cary Manufacturing Company on or about September 25, 1900, and as agent for Cary Manufacturing Company he has been and is now offering said clasps for sale at Baltimore, but would not make any affidavit in this case. These clasps are the same as referred to in the last preceding paragraph.

12 Affiant states that one Webster J. Mott, of New York city, admitted to affiant that he had purchased within the last month a large quantity of staple-fasteners like Exhibit D from Cary Manufacturing Company, which company had offered them for sale to said Mott.

Affiant states that he has obtained the affidavit of said Webster J. Mott in regard to the purchase, sale and delivery.

Affiant states that Spencer C. Cary, president of the defendant company, and Mr. Vernilya, the attorney for said company, stated to affiant on being questioned by him and shown Exhibit D, that they had manufactured and sold a large quantity of clasps like Exhibit D since the injunction of this court hereinbefore recited; and stated to affiant that they intended to continue such manufacture notwithstanding the injunction, claiming that the structure so manufactured embodies the details of construction of a certain prior patent to one Miles, which has long since expired. Affiant states that he particularly warned the defendant and its attorneys that the manufacture of this staple, Exhibit D, is considered a violation of the injunction and would be brought to the attention of the court if its manufacture is persisted in; but that the said Spencer C. Cary declared his intention to disregard the warning.

Affiant states that the characteristic of the staple in the said Miles patent is that the bar part, which is practically of the same thickness as the points and heads of the staple, is stiff and rigid, instead of flexible, and the concave-convex form given to said part is especially set forth in the specification of said patent to be given thereto to make it more stiff and rigid than if left in the original round shape. Affiant states that it is this very stiffness that complainant's patent seeks to avoid; and affiant states that defendant's staple is so made that any possible increase to rigidity which the concave-convexity might offer is nullified, and the staple is in all

13 particular as flexible as that of complainant's patent, and is in every way unsuitable for the purposes mentioned in the Miles patent.

Affiant states, further, that the staple Exhibit D so resembles complainant's staple as to mislead the purchaser, and affiant's customers have said to him that they saw no material difference between the articles.

Affiant states that the benefits which should come to the complainant by the injunction of this court are practically nullified by reason of the manufacture by the defendant of Exhibit D so nearly resembling the patented structure as not to be distinguishable therefrom.

JAMES E. MacMURRAY.

Subscribed and sworn to before me this 26th day of October, 1900.

ROSWELL S. NICHOLS,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed N. Y. Co.

(Endorsed:) United States circuit court, southern district of New York.—Acme Flexible Clasp Company *vs.* Cary Manufacturing Company.—Notice of motion, motion and affidavits.—U. S. circuit court.—Filed Nov. 12, 1900.—John A. Shields, clerk.

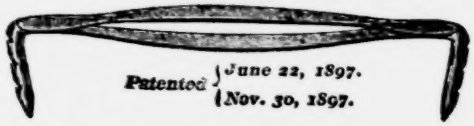
14 EXHIBIT C.

Confectioners' and Bakers' Gazette,

New York, October 10, 1900.

Page 45.

CARY'S
SPLIT WIRE CLASPS.



WE are Not Saying Much.
THEY Speak for Themselves.
TRY THEM.

CARY MFG. CO. 19-21 Roosevelt Street, New York.
SAMPLES FREE.

2—122

U. S. Circuit Court, Southern District of New York.

ACME FLEXIBLE CLASP COMPANY
against
CARY MANUFACTURING COMPANY. } In Equity.

CITY AND COUNTY OF NEW YORK, *ss:*

Ernest H. Vogel, being duly sworn, deposes and says:
15 That he is and has been for years past engaged in designing and superintending the manufacture of machinery and special tools. That he was shown a copy of United States letters patent 88501 issued to Purches Mills March 30, 1869, and was requested by the Cary Manufacturing Company to determine what machinery was needed to manufacture such an article in quantity. He studied the same to determine what machinery was necessary for its manufacture, and has since superintended the manufacture and equipment of machinery for that purpose, and the concave clasp now produced by the Cary Manufacturing Company is manufactured by the use of said machinery, and the goods turned out by said machinery are exactly such goods as would be turned out by machinery designed, intended and constructed to make the fastener of said Mills patent aforesaid. Some are harder and have more spring than others, but the thickness remains uniform since they are made on the same dies.

ERNEST H. VOGEL.

Sworn to before me this — day of November, 1900.

FRANK C. BRAND,
[SEAL.] *Notary Public* (*No.* 217), *N. Y. County.*

U. S. Circuit Court, S. D. New York.

ACME FLEXIBLE CLASP COMPANY
against
CARY MANUFACTURING COMPANY. } In Equity.

CITY AND COUNTY OF NEW YORK, *ss:*

James C. Battell, being duly sworn, deposes and says:
16 That he is employed by the defendant the Cary Manufacturing Company, but that said employment began since January 3, 1900, and he never was employed by said company before that date.

That he has never been furnished with samples of the split clasp said company formerly made nor with prices nor with discounts nor with any other information that would enable him to sell the same, and he never has sold any and never has offered any for sale, and said company has never directed or requested him to offer said split clasps for sale.

When he called upon Webster J. Mott, deponent specifically stated to said Mott that said Cary Manufacturing Company was not selling the said split clasp any more, but was selling a new clasp, to wit,

the concave clasp, and the postal card which deponent left with said Mott was not left with the purpose that said Mott should order split clasps, but that he might order such other goods of defendant's manufacture as he needed.

JAS. E. BATTELL.

Sworn to before me this 2d day of November, 1900.

JAMES A. DONEGAN,
[SEAL.] *Notary Public, N. Y. Co.*

U. S. Circuit Court, Southern District of New York.

ACME FLEXIBLE CLASP CO.
against
CARY MANUFACTURING CO. } In Equity.

CITY AND COUNTY OF NEW YORK, *ss:*

Spencer C. Cary, being duly sworn, deposes and says: That
17 he is the president and business manager of the defendant company, and since January 3, 1900, he has carefully refrained from making, using or selling any of the articles heretofore declared to infringe the complainant's patent 314,204, for staple-fasteners. Not only so, but on said January 3, 1900, deponent gave strict orders to all of the company's employees that none of such goods should be thereafter made, used or sold, and deponent is firmly convinced that said orders have been faithfully carried out and obeyed, and that none of such articles have been made or sold and nothing whatever done with any of them, except in one instance which he had only recently learned, that a few were given to a man by one of the employees without the knowledge of deponent, or of any officer of said defendant company, the quantity was only four (4) pounds, and as soon as deponent learned of the gift he severely condemned the action and directed that not even a gift of one of such goods should be made. Indeed, this company at once abandoned the use of much complicated and expensive special machinery constructed before this suit was brought for the express purpose of making the split clasp held to infringe, and that machinery has ever since stood idle, being only useful for that purpose.

It is true that for a time after January 3, 1900, there were advertisements of the defendant company published which contained a cut of the clasp held to infringe, but the facts regarding those advertisements are that previous to the issuing of any injunction herein the defendant company had made contracts with three different journals to publish its advertisement for a period of one year from the time of making the contracts. One of these advertisements was heretofore referred to in the previous motion made by complainant in April last. It has since expired and has not been renewed, and a second one also.

A third was that in the *Confectioner's Gazette*. It was made in
October, 1899, for one year, and has now expired, and, though
18 the representative of said paper called a short time ago and asked that the contract be renewed, he was informed that

defendant did not care to renew it, and it was not renewed. The only reason said advertisements continued to run was, as before stated, the contracts were for a year, and as defendant was obligated to pay for them, and they mentioned other goods also, it simply let them run for their unexpired terms.

In regard to the postal card, defendant had on hand on January 3, 1900, a large number of business cards and also a large number of postal cards. They bore cuts of defendant's goods as shown. The postal cards were used by its salesmen who in calling for orders frequently left them for parties who did not order at the time, that they might use them in sending an order by mail, but deponent is informed by all of defendant's salesmen and verily believes it to be true that said cards have never since January 3, 1900, been used by them or either of them to solicit orders for the split clasps thereon represented, nor have they, to deponent's knowledge been used to order said clasps by parties having them, certainly no such orders have been filled. If customers have informed Mr. McMurray that defendant continues to offer for sale fasteners such as have been specifically described in the writ of injunction, then, unless they merely had reference to the advertisements aforesaid said customers have stated what was untrue.

Webster J. Mott, whose affidavit is presented by complainant, has purchased goods of defendant to the following extent:

April 18, 1899, 500 pounds split clasps.

May 26, 1899, 500 pounds split clasps.

September 29, 1900, 100 pounds concave coppered clasps

Deponent is verily of the opinion that his purchase of September 20, 1900, was made at the request of the complainant herein, but it was unnecessary for complainant to make use of that method of procuring proof.

19 Defendant's sale of the concave clasp has been done openly and in full faith that it has a perfect right to do so. Its intention to do so was publicly announced as long ago as April 12, 1900, in an affidavit made herein and now on file in this court.

It has been advised by various counsel that it had a clear and perfect right to do so, and in reliance upon its belief in that right it has gone to large expense in fitting up entirely new machinery for the purpose of making the said "concave clasp," which is made in accordance with United States letters patent 88,501, issued to Purches Miles, March 30, 1869, and long since expired, a copy of which is annexed.

As soon as it knew that complainant was seeking proof of its having sold said concave clasps, it offered to furnish said proof thereof, but it has not sold large quantities thereof. Complainant's alleged warning that it considered said concave clasp a violation of the injunction was merely a statement recently made that complainant was about to make the motion which it now has noticed for hearing, and the statements of deponent and his counsel that defendant intended to continue to make concave clasps were not that it so intended, notwithstanding the injunction, but because it did not consider that the injunction prohibited such manufacture. Said Mc-

Murray did not show Exhibit D or any duplicate of it to deponent, and deponent is informed by Mr. Vermilya, and verily believes it to be true, that said McMurray did not show any clasp to said counsel.

Deponent has carefully read the said Miles patent 88,501, and compared it with the device manufactured by defendant, the device patented by complainant and the device declared to be an infringement. In his opinion and belief, the concave clasp is just such a device as that mentioned and described in the Miles patent; but differs in several particulars from the split clasp declared to infringe, and from the "staple-fastener," described and claimed in patent 314,204.

20 The Miles patent recites (paragraph 9) that its device is "formed of two penetrating points at or near the ends of a "clamping bar, *or binder*, made out of the same material as the "tacks, and flattened so as to hold the woven or other fabric securely "along an extended surface and bind the same firmly to place."

Again "*a a* are the tacks or *penetrating points*, standing at right "angles or nearly so to the bar *b* that connects said tacks together."

"This bar *b* is flattened and made slightly concave on the under "side, as seen in figure 2, so as to be stiff, and at the same time to "clamp or bind the material into which the tacks are driven."

"The sectional shape of this bar *b* may, however, be varied, if "desired."

It is true the concave clasp has two "tacks or penetrating points "at the ends of a bar of the same material," and that the staple of patent 314,204 also has two penetrating points, and the infringing split clasp as well, but so has the fastener of Miles, and in that particular the *conclave clasp* has no more than the Miles or any other staple-fastener, such for instance as a double-pointed tack. Such resemblance to the Swett clasp is only because the Swett resembles the Miles and not because the concave resembles any feature special to the Swett. The points are nearly at right angles to the bar. Here again the resemblance is merely a mutual resemblance of the Swett and concave to the Miles.

The bar *b* of the *conclave clasp* is flattened in that it is not completely round, and so is the Miles, and the Swett is also flattened.

It being thinner than the original stock, the concave resembles the Miles. So does the Swett, and both being thus somewhat like the Miles, must to some degree resemble each other, but the concave is not flattened like the Swett.

The Swett clasp must have *heads* for driving, and if that mean special heads prepared for that purpose, then the concave does not have them. It may of course be driven, so may the Miles. Miles'

21 patent says "*the tacks are driven*," but the concave is merely turned down as is the Miles, and there are no special "heads" for driving. Its capacity of being driven depends on the fact that it is so formed that the blow may be struck immediately over the tang and not because of the presence there of any "head," in which it resembles the Miles rather than the Swett device. An examination of the Swett patent shows that the highest points of the upper surface are at what are called the "heads." If one is turned

upon its back, it rests upon the so-called "heads." This is not so of the *concave*. If turned upon its back it rests upon the center portion of the bar *b* and (perhaps) one end, and may be spun around upon that central point, which cannot be done with the Swett clasp in its normal condition.

The concave therefore is not flattened as is the Swett, but to resemble the Miles.

This is proven by the very steps taken in manufacturing the respective goods. Mr. Swett declares (answer 59, record on final hearing) that as the swaging blocks approach each other the convex surface of the one (the upper one) first touches the blank at the longitudinal center. While it is apparent to the most casual observer that the upper swaging block or die of defendant's swager cannot first touch at the longitudinal center, for it must possess a hollow at that point into which the material can be forced in order to form the concave surface its finished form exhibits.

If the Miles be driven into an article the edges of the bar touch that article before the longitudinal medium line does, and bites the article, say a shade or a carpet, along the edge of the clasp, so does the concave. The Swett does not, and in this respect the concave differs from the Swett and resembles the Miles.

The purpose of the convexity of the Miles clasp is that it may "*clamp or bind the material into which the tacks are driven*," and the form of the concave clasp accomplishes that identical pur-
22 pose. If one be driven into a shade and shade-roller it will be found that the shade is held tightly to the roller, not only where the tangs pass through it and enter the wood, but also all along the edge of the fastener. This is clearly apparent if one be driven into soft wood. It will be found that the edges bite into the wood and leave a mark while the central portion between the edges has not touched the wood, but in the Swett clasp if driven sufficiently to have the edges indent the wood the full width of the bar must be forced into the wood and the entire body of the wood within the lines of the clasp compressed, in which respect the concave resembles the Miles but not the Swett clasp.

Again, making the Miles clasp concave gives it stiffness and this is equally true of the "concave." The degree of stiffness depends, of course, upon the basic material, but that is nowhere described in either patent, and whatever that be, it is certainly true that the concave clasp has more stiffness and rigidity after it is given the concave form than it had before, since that is true of any material whatever, even paper is stiffer in such form than if left perfectly flat.

Mr. McMurray, in his affidavit, recited that defendant's concave clasp is unsuitable for the purposes mentioned in the Miles patent. This is untrue, for it has been used for exactly the same purpose for which Miles uses his, and it has sufficient rigidity for that purpose. It is not as rigid as cast iron, neither is Miles', but whatever rigidity it lacks is not absent because of any following of anything set forth or described in the Swett patent. Mr. McMurray also says that the bar part of the Miles fastener is of the same thickness as the points

and heads (this is a manifest error, for only the bar *b* is flattened), and said McMurray says that the concave-convex form is said to make it more stiff and rigid than if left in the *original round shape*. I do not so read the patent, but read that the concaving makes it more stiff than before concaving, but in either event defend-
23 ant has exactly followed Miles by flattening round stock and concaving it, and has by so doing made it more stiff and rigid than it would be without that concaving.

Swett does not do this, and complainant's officer specifically declares it purposely avoids doing it and that the Swett patent seeks to avoid the stiffness thereby produced.

Deponent therefore reiterates with emphasis that in this particular also the concave clasp fails to resemble the Swett patented clasp, but does resemble the Miles fastener.

As deponent understands the Swett patent, an article to come within its terms must be *so thinned* that the resulting article has less tendency to draw out the shanks when they are driven into whatever is secured *than has the original stock*, but the deponent has found by actual trial that when the die has formed the clasp into the concave form used by defendant the resultant clasp has fully as much and sometimes more tendency to draw out the shanks or tangs than was the case with the original stock, and it is not *so thinned* as to remove whatever of this tendency the original stock possessed. The pressure of the dies used to shape the stock into the concave form hardens that stock so that it has more spring than the original stock.

The feature of hardness, however, depends largely on other conditions than the flattening. Some of defendant's manufacture are harder and have more spring than others, though the thinness remains the same, since both those which are harder and have more spring and those which are softer and have less spring are formed by the same dies and are of even thickness.

Deponent attaches hereto a fastener for complainant's manufacture marked "A," stamped with the year its patent issued and having very short tangs, which though quite thin has considerable spring; indeed it has more spring than others of complainant's manufacture which are not nearly so thin, such as Exhibit B. If put to some uses this spring would have a tendency to draw out the
24 shanks; if put to other uses (such as fastening stamps on beer kegs) the fastener would not be bent and the spring could have no such tendency. If the original stock had been put to this second use its spring, if it possessed any, would likewise be without effect toward drawing out the shanks, and it is therefore manifest that ordinary thinning does not necessarily remove this tendency if it originally exists. If flattened when the metal was hot there would be a difference. It is true that such clasps may have that spring reduced or removed by annealing, but that will be because of the annealing and not because of the thinning; and even if they are annealed the concave clasps will retain as much of said spring as would the original stock if likewise annealed. They have not less metal in cross-section than the original stock, nor are they *so thinned* that they have no spring to draw out the shanks.

It is declared in the Swett patent, that "when properly driven the "fastener will not project from the wood only about the thickness "of ordinary sheet tin."

This is not the case with the concave clasp, it will project the thickness of the clasp and an additional thickness equal to the depth of the concavity, in which respect it differs from the Swett device and resembles the Miles.

The opinion expressed by Mr. McMurray that the *concave clasp* is in all details exactly in accordance with complainant's patent and the specific description of fastener enjoined, is in deponent's opinion unwarranted and untrue, as is his statement that the differences are without functional result.

Defendant sells the concave clasp as its own manufacture and has never done anything to deceive any one into thinking otherwise, and whatever result such sale has on complainant's business is no more than legitimate and honorable competition in offering an article free to the world to make and sell has produced or may produce.

25 Defendant has in good faith acquiesced in the determination of the court and obeyed its order, but it has not believed, and does not now believe, that the court has made or will make any order preventing it from making and selling the article it has fashioned on the lines of a patent issued more than fifteen (15) years before Mr. Swett filed his application for the one in suit.

Deponent attaches hereto, marked "C," several pieces of the original stock from which all its concave clasps have been made. Exactly such stock (part of the same lot) without the slightest change in it, was fed directly into the machine to produce the concave clasps hereto attached, marked "D," and said clasps are in just the condition in which they came from said machine, except that they have been coppered, but they have not been otherwise treated. They are formed cold and so are all the concave clasps: the wire is not heated when presented to the dies.

Deponent also produces a piece of shade-roller upon which a shade has been secured by clasps marked "E," which were made from the same lot of wire stock as the clasp sold to Mr. Mott on September 29, 1900, and by exactly the same process in every particular, and no other, and upon the same machines used in making the "Mott" clasp and no others. It will be found that their edges bind the curtain to the roller.

Deponent also attaches a copy of United States letters patent 249,851, issued to G. W. McGill, November 22, 1881, Figs. 11 and 12 of which show that the novelty of the Swett fastener patented in 1885 could not have been the mere thinning by pressure of the connecting bar.

SPENCER C. CARY.

Sworn to before me this 7th day of November, 1900.

JAMES A. DONEGAN,

[SEAL.] *Notary Public* (73), *New York Co.*

P. MILES.

CURTAIN AND CARPET FASTENER.

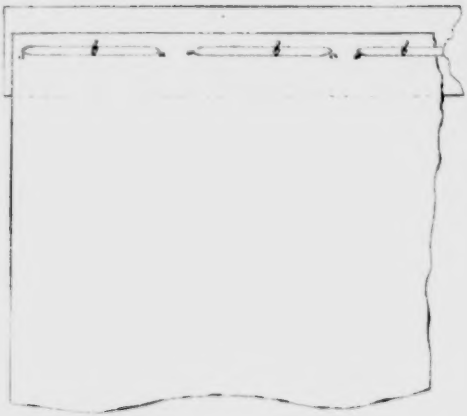
No. 88,501. Patented Mar. 30, 1869.

Fig. 1

Fig. 2

No 122.
Carey Co. p. 26
Acme Co.

Fig. 3



Witnesses

Purchas Miles

27 UNITED STATES PATENT OFFICE.

PURCHES MILES, of New York, N. Y.

Letters Patent No. 88,501, dated March 30, 1869.

Improved Fastening for Curtains and Carpets.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Purches Miles, of the city and State of New York, have invented and made a certain new and useful improvement in fastenings for curtains, carpets, upholstery, &c., which I denominate "a tack and binder;" and I do hereby declare the following to be a full, clear, and exact description of the said invention, reference being had to the annexed drawing, making part of this specification, wherein—

(Here follows diagram marked p. 26.)

Figure 1 is a side view of said tack and binder;

Figure 2 is a section of the same, at the line *x x*; and

Figure 3 is an elevation, representing said tack and binder, as applied to the edge of a window-curtain at the roller.

Similar marks of reference denote the same parts.

In attaching window-shades, or curtains to rollers, tacks have usually been employed. These cause the fabric to tear when subjected to any unusual strain, particularly in cases where the curtain runs down with rapidity, and unwinds entirely from the roller.

With carpets, rugs, druggets, &c., that are exposed at the edges to the feet in passing, said edges frequently curl up and become dangerous, and liable to trip a person, particularly at the parts between the ordinary tacks; and in upholstery-work, the edges of the fabrics frequently become loose and torn, from the fact that the tacks only hold a small portion of the fabric.

In rugs, matting, &c., the material being of a loose texture, the tack-head does not hold firmly, but allows the material to become detached easily.

The nature of my said invention consists in a tack and binder, formed of two penetrating-points at or near the ends of a clamping-bar, or binder, that is made out of the same piece of material as the tacks, and flattened so as to hold the woven or other fabric securely along an extended surface, and bind the same firmly to place.

In the drawing—

a a are the tacks, or penetrating-points, standing at right angles, or nearly so, to the bar *b* that connects said tacks together.

This bar *b* is flattened and made slightly concave on the under side, as seen in Fig. 2, so as to be stiff, and, at the same time, to

clamp or bind the material into which the tacks are driven. The sectional shape of this bar *b* may, however, be varied, if desired.

Tacks and binders of this character are very easily applied or withdrawn, and from the extent of surface or edge that is covered by the bar *b*, the fabric is held very securely, and is not as liable to injury as fabrics attached in the usual manner.

This invention is available for window-curtains, preventing them tearing at the point of attachment to the roller, and allowing the shade or curtain to be rolled up in either direction. When applied to carpets, rugs, matting, furniture-covering, oil-cloths, &c., the material is very firmly held, and injury to the same prevented.

The length of the bar *b* and of the points *a*, may be varied to suit the use to which this tack and binder are to be put, and the size of the metal employed is to be according to the strength required.

The surface of the bar *b* may be ornamented, if desired.

What I claim, and desire to secure by letters patent, is—

The tack and binder, as a new article of manufacture, formed of the penetrating points and flattened bar, as and for the purposes specified.

In witness whereof, I have hereunto set my signature, this 24th day of December, A. D. 1868.

PURCHES MILES.

Witnesses:

CHAS. H. SMITH.
GEO. T. PINCKNEY.

(No Model.)

G. W. McGILL.

STAPLE OR TAG FASTENER.

No. 249,851. Patented Nov. 22, 1881.

Fig. 1.

Fig. 2.

Fig. 3.

Fig. 4.

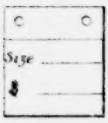


Fig. 5.

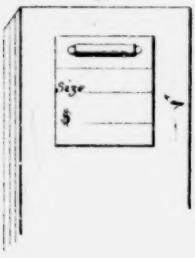


Fig. 6.

No. 122 Cary Co. } $ 2.8
Acme Co.

Fig. 7.

Fig. 8.

Fig. 9.

Fig. 10.

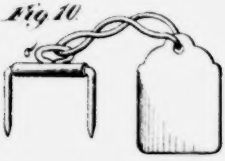


Fig. 11.

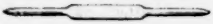


Fig. 12.

Fig. 13.

Fig. 14.

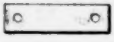


Fig. 15.

Witnesses.
Robert Emmett
Vinton Coombs

Inventor.
George W. McGill
By J. J. Coombs
Atty

29 UNITED STATES PATENT OFFICE.

GEORGE W. MCGILL, of New York, N. Y.

Staple or Tag Fastener.

Specification forming part of Letters Patent No. 249,851, dated November 22, 1881. Application filed September 27, 1881. (No model.)

To all whom it may concern:

Be it known that I, George W. McGill, a citizen of the United States, residing at New York city, in the county of New York and State of New York, have invented certain new and useful improvements in staple-fasteners or tag-fastenings; and I do hereby declare the following to be a full, clear, and exact description, of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

The object of this invention is to produce a cheap fastener for binding and ticketing silks, cloths, and other fibrous material, the shanks of which, in passing through the material, will not cut the fibers of the same, but merely push them aside.

It consists of a piece of flexible round wire, of suitable length and thickness, pointed at both ends, with its center portion inclosed in a metal casing or tube to give it rigidity, and its ends or uncovered parts bent down at right angles from its covered center to form its penetrating shanks.

(Here follows diagram marked p. 28.)

In the drawings, figure 1 represents the round and pointed flexible-wire blank. Fig. 2 represents, in blank, the center stiffening-tube. Fig. 3 represents the wire bent into shape, its center inclosed in the stiffening-tube. Fig. 4 represents a ticket or tag which the fastener is designed to attach to cloth, &c. Fig. 5 is a top view of the fastener attaching a ticket to several sheets of cloth. Fig. 6 is a cross-section of Fig. 5, showing the shanks of the fastener run through the ticket and the cloth and bent apart on the bottom side of the cloth, binding them all together. Fig. 7 represents the wire head of the staple extended on one side in the form of a loop or ring, adapting the staple to hang or suspend upon a hook or nail the articles bound by it, or to be tied to a marking-tag by a string, as shown in Fig. 10. Fig. 8 represents the blank of the stiffening-tube provided with a center opening to be used on a staple with a looped head. In constructing the staple in this form the loop is formed in the center of the wire, and the ends of the wire are run through the center hole in the tube-blank and bent apart and the tube-blank folded around them, and their uncovered ends or shanks bent down at right angles from their covered center; or the blank of the center tube may be nicked or cut out at each side, as shown

at Fig. 9, and folded around the staple-head, after the same has been bent into form, so that the neck of the loop will occupy the nicks or slots in the split side of the tube. Fig. 10 represents the staple having its head looped and tubed and a tag tied in its loop. Fig. 11 represents the staple-wire blank struck flat in its center. Fig. 12 represents the blank so struck bent into staple form; and Fig. 13 represents a staple with its head so flattened, having its flat head inclosed in a correspondingly-shaped tube to increase its stiffness and width.

The head of the stable may be made to project longitudinally beyond its shanks by making its center tube longer than the head formed by the folding of the wire, and providing the tube with two holes for the reception of the shanks of the staple, as shown in Fig. 14, and pinching the projecting ends of the tube, after the same has been closed on its head, as shown in Fig. 15.

What I claim as my invention is—

1. A double-pronged fastener or pin made of a single piece of flexible wire pointed at both ends, having its center portion inclosed in a metal tube and its ends bent down at right angles from its covered center, substantially in the manner and for the purposes herein set forth and described.

2. A double-pronged fastener or pin made of a single piece of flexible wire pointed at both ends, having its center portion provided with the loop *a* and inclosed in a metal tube and its ends bent down at right angles from its covered center, substantially in the manner and for the purposes herein set forth and described.

In testimony whereof I affix my signature in presence of two witnesses.

GEORGE W. McGILL.

Witnesses:
HENRY SCOTT.
W. R. NOÉ.

(Endorsed:) U. S. circuit court, S. D. of New York.—In equity.—Acme Flexible Clasp Co. against Cary Manufacturing Co.—Affidavits of Cary, Battell, Vogel, Nov., 1900.—A. G. N. Vermilya, sol'r for defendant, Temple court, 5 & 7 Beekman St., New York city.—U. S. circuit court.—Filed Nov. 12, 1900.—John A. Shields, clerk.

U. S. Circuit Court, Southern District of New York.

ACME FLEXIBLE CLASP CO.
vs.
CARY MANUFACTURING CO.

LACOMBE, *Circuit Judge:*

Disobedience of the injunction seems to be very clear, and the motion to punish for contempt is granted. Complainant may take

an order imposing a fine of $2,000, half to complainant, half to the United States.

Nov. 12, 1900.

(Endorsed:) Circuit court of the United States for the southern district of New York.—Acme Flexible Clasp Co. *vs.* Cary Manufacturing Co.—Opinion, Lacombe, C. J.—U. S. circuit court.—Filed Nov. 12, 1900.—John A. Shields, clerk.

31 At a stated term of the circuit court of the United States of America, in and for the southern district of New York, in the second circuit, held at the court-rooms of said court, in the Post-office building, in the borough of Manhattan, in the city of New York, on the 16th day of Nov. A. D. 1900.

Present: Honorable E. Henry Lacombe, circuit judge.

ACME FLEXIBLE CLASP COMPANY
against
CARY MANUFACTURING COMPANY.

The case having come on to be heard, upon a motion, of William A. Redding, Esq., solicitor for the complainant for an order to commit and punish the defendant, its officers, employees, agents and attorneys, for contempt in violating the injunction made and issued herein on the 29th day of December, 1899:

Now, after reading the injunction and the notice of motion, the affidavit of Webster J. Mott, verified October 24, 1900, and the affidavit of James E. McMurray, verified October 26, 1900, in support of said motion, and the affidavits of James C. Battell and Ernest H. Vogel, verified November 2, 1900, and that of Spencer C. Cary, verified November 7, 1900, submitted in opposition thereto; and after hearing counsel for the respective parties, and it appearing that the defendant has been guilty of disobedience of said injunction, in that it has made and sold certain clasps called by it "concave clasps" or new clasps, samples of which marked

32 "B" are attached to the said affidavit of Webster J. Mott; samples marked "D" are attached to the affidavit of James E. McMurray, and samples marked "D" and "E" are attached to the said affidavit of Spencer C. Cary, and has continued to advertise and offer for sale clasps in all respects similar to those which were before the court when the original injunction was granted, it is hereby

Ordered, that the defendant be and hereby is fined the sum of two thousand dollars ($2,000), for said contempt, to be paid to the clerk of this court, one-half of said sum to be paid by him to the complainant and one-half thereof to be paid to the United States; and it is further

Ordered, that the defendant pay the above fine of two thousand dollars ($2,000) as above ordered, within ten days from the date of the entry of this order after service of a copy of it upon said defendant.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—Acme Flexible Clasp Company against Cary Manufacturing Company.—Order to punish the defendant for contempt.—U. S. circuit court.—Filed Nov. 16, 1900.—John A. Shields, clerk.

33 *Assignment of Errors.*

Circuit Court of the United States for the Southern District of New York.

CARY MANUFACTURING COMPANY, Plaintiff in Error,
against
ACME FLEXIBLE CLASP COMPANY, Defendant in Error.

Of October term, in the year of our Lord one thousand nine hundred.

Afterwards, to wit, on the 10th day of January, in this same term of the United States circuit court of appeals for the second circuit, at the court-house, in the city of New York, N. Y., comes the said Cary Manufacturing Company by A. C. M. Vermilya, its attorney, and says: That in the record and proceedings aforesaid wherein judgment was entered against the Cary Manufacturing Company November 16, 1900, there is manifest error in this, to wit:

The Cary Manufacturing Company, plaintiff in error, respectfully submits that the honorable judge of the United States circuit court in and for the southern district of New York erred in deciding the case of The Acme Flexible Clasp Company against Cary Manufacturing Company, and in granting the judgment, order and decree entered therein in the said circuit court on the 16th day of November, A. D. 1900, in the particulars hereinafter named, and the

34 judgment so entered is in such particulars and in each of them erroneous, and it excepts thereto on each of the grounds named.

1. The court erred in declaring and adjudging that the making and selling of the "concave clasps" named in said judgment was a disobedience of the said injunction therein named and said judgment is erroneous in that respect.

2. The court erred in declaring and adjudging that the making and selling of the clasps marked "B" named in said judgment was a disobedience of the said injunction therein named, and said judgment is erroneous in that respect.

3. The court erred in declaring and adjudging that the making and selling of the clasps marked "D" named in said judgment was a disobedience of the said injunction therein named and said judgment is erroneous in that respect.

4. The court erred in declaring and adjudging that the making and selling of the clasps marked "D," second named in said judgment, was a disobedience of the said injunction therein named and said judgment is erroneous in that respect.

5. The court erred in declaring and adjudging that the making

and selling of the clasps marked "E" named in said judgment was a disobedience of the said injunction therein named and said judgment is erroneous in that respect.

6. The court erred in declaring and adjudging that by advertising, defendant had been guilty of disobedience of its injunction, and said judgment is erroneous in that respect.

7. The court erred in declaring and adjudging that defendant did advertise its goods in disobedience of its injunction, and said judgment is erroneous in that respect.

35 8. The court erred in declaring and adjudging that defendant offered for sale, in disobedience of its injunction, clasps like those before the court when its said injunction was granted, and said judgment is erroneous in that respect.

9. The court erred in declaring and adjudging that defendant had been guilty of disobedience of its injunction by offering for sale clasps like those before the court when its said injunction was granted, and said judgment is erroneous in that respect.

10. The court erred in declaring and adjudging that its said injunction covered and included clasps such as "B," named in its said judgment, and said judgment is erroneous in that respect.

11. The court erred in declaring and adjudging that its said injunction covered and included clasps such as "D," named in its said judgment, and said judgment is erroneous in that respect.

12. The court erred in declaring and adjudging that the said injunction covered and included clasps such as "D second," named in its said judgment, and said judgment is erroneous in that respect.

13. The court erred in declaring and adjudging that its said injunction covered and included clasps such as "E," named in its said judgment, and said judgment is erroneous in that respect.

14. The court erred in declaring and adjudging that U. S. letters patent 314,204 covered and included within its claim such clasps as those referred to in its said judgment as "B," and said judgment is erroneous in that respect.

15. The court erred in declaring and adjudging that U. S. letters patent 314,204 covered and included within its claim such
36 clasps as those referred to in its said judgment as "D," and said judgment is erroneous in that respect.

16. The court erred in declaring and adjudging that U. S. letters patent 314,204 covered and included within its claim such clasps as those referred to in its said judgment as "D second," and said judgment is erroneous in that respect.

17. The court erred in declaring and adjudging that U. S. letters patent 314,204 covered and included within its claim such clasps as those referred to in its said judgment as "E," and said judgment is erroneous in that respect.

18. The court erred in that it did not adjudge that said clasps named therein as "B" were not within the terms of U. S. letters patent 314,204 and were not infringements thereof, and said judgment is erroneous in that respect.

19. The court erred in that it did not adjudge that said clasps named therein as "D" were not within the terms of U. S. letters

patent 314,204 and were not infringements thereof, and said judgment is erroneous in that respect.

20. The court erred in that it did not adjudge that said clasps named therein as "D second" were not within the terms of U. S. letters patent 314,204 and were not infringements thereof, and said judgment is erroneous in that respect.

21. The court erred in that it did not adjudge that said clasps named therein as "E" were not within the terms of U. S. letters patent 314,204 and were not infringements thereof, and said judgment is erroneous in that respect.

22. The court erred in that it did not adjudge that said
37 clasps named therein as "B" were made in accordance with U. S. letters patent 88,501 and therefore free for the defendant to make, and said judgment is erroneous in that respect.

23. The court erred in that it did not adjudge that said clasps named therein as "D" were made in accordance with U. S. letters patent 88,501 and therefore free for the defendant to make, and said judgment is erroneous in that respect.

24. The court erred in that it did not adjudge that said clasps named therein as "D second" were made in accordance with U. S. letters patent 88,501 and therefore free for the defendant to make, and said judgment is erroneous in that respect.

25. The court erred in that it did not adjudge that said clasps named therein as "E" were made in accordance with U. S. letters patent 88,501 and therefore free for the defendant to make, and said judgment is erroneous in that respect.

26. The court erred in adjudging that defendant be fined without first directing defendant to show cause why it should not be fined, and said judgment is erroneous in that respect.

27. The court erred in directing that one thousand dollars ($1,000) of said fine be paid to the complainant, and said judgment is erroneous in that respect.

28. The court erred in not deciding and adjudging that the acts of the defendant were without any intention to disobey its injunction, and said judgment is erroneous in that respect.

29. The court erred in that by its said judgment it has construed its said injunction to cover and include matters not within its terms, and said judgment is erroneous in that respect.

38 30. The court erred in that by its said judgment it has construed its said injunction to prohibit defendant from making, using or selling goods which had not theretofore been held to infringe, and which did not infringe United States letters patent 314,204, but which were such as were described and shown in United States letters patent 88,501, and said judgment is erroneous in that respect.

31. The court erred in declaring and adjudging that the making and selling of a clasp like that shown and described in the Purches Miles patent 88,501 was a disobedience of its said injunction, and said judgment is erroneous in that respect.

32. The court erred in declaring and adjudging that defendant after injunction issued, had advertised certain infringing clasps, when

it should have adjudged that the order and contract for said advertising was given and made before the issue of said injunction and no such order to advertise was given and no such contract was made by defendant after the issue of said injunction, and said judgment is erroneous in that respect.

33. The court erred in adjudging that defendant was guilty of disobedience of its injunction, whereas, in fact, the injunction was no longer in force at the date of the alleged disobediences, and said judgment is erroneous in that respect.

34. The court erred in adjudging that defendant be fined, and said judgment is erroneous in that respect.

35. The court erred in adjudging that defendant be fined in the sum of $2,000, which is an excessive amount, and said judgment is erroneous in that respect.

And the said Cary Manufacturing Company prays that the
39 judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

A. G. N. VERMILYA,
Attorney and of Counsel for Cary Manufacturing Co., Plaintiff in Error.

(Endorsed:) U. S. circuit court, S. D. of New York.—Cary Manufacturing Company, plaintiff in error, ag'st Acme Flexible Clasp Company, defendant in error.—Assignment of error and exceptions.—A. G. N. Vermilya, attorney for plaintiff in error, Temple court, 5 & 7 Beekman street, New York city.—U. S. circuit court.—Filed Jan. 10, 1901.—John A. Shields, clerk.

Bond.

Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

CARY MANUFACTURING COMPANY, Plaintiff in Error,
against
ACME FLEXIBLE CLASP COMPANY, Defendant in Error.

Know all men by these presents, that we, Spencer C. Cary and Margaret W. Cary, of New York city, New York, are held
40 and firmly bound unto the said Acme Flexible Clasp Company, its successors and assigns, in the sum of five hundred dollars ($500), to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated this 10th day of January, A. D. 1901.

Whereas, the above-named Cary Manufacturing Company hath prosecuted a writ of error to the United States circuit court of appeals for the second circuit to reverse the judgment rendered in the case of Acme Flexible Clasp Company against the Cary Manufactur-

ing Company, by the United States circuit court in and for the southern district of New York on the sixteenth day of November, A. D. 1900.

Now, therefore, the condition of this obligation is such, that if the above-named Cary Manufacturing Company shall prosecute its said writ of error to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 10th day of January, A. D. one thousand nine hundred and one.

SPENCER C. CARY. [L. S.]
MARGARET W. CARY. [L. S.]

Sealed and delivered in presence of—
FRANK C. BRAND.

CITY AND COUNTY OF NEW YORK, *ss:*

Spencer C. Cary, being duly sworn, says: That he is a resident and householder within the State and city of New York, and worth more than ($1,000), twice the sum specified in the above bond, over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

SPENCER C. CARY.

Sworn to before me this 10th day of January, 1901.

FRANK C. BRAND,
[SEAL.] *Notary Public* (217), *N. Y. County.*

41 CITY AND COUNTY OF NEW YORK, *ss:*

Margaret W. Cary, being duly sworn, says: That she is a resident and freeholder within the State and city of New York, and worth more than ($1,000), twice the sum specified in the above bond, over and above all the debts and liabilities which she owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

MARGARET W. CARY.

Sworn to before me this 10th day of January, 1901.

FRANK C. BRAND,
[SEAL.] *Notary Public* (217), *N. Y. County.*

STATE, CITY AND COUNTY, AND SOUTHERN DISTRICT OF NEW YORK.

I, Frank C. Brand, hereby certify that on this 10th day of January, one thousand nine hundred and one, before me personally appeared the above-named Spencer C. Cary and Margaret W. Cary, each to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally

acknowledged to me that they executed the same for the uses and purposes therein mentioned.

FRANK C. BRAND,
[SEAL.] *Notary Public* (217), *N. Y. County.*

(Endorsed:) U. S. circuit court, S. D. of New York.—Cary Manufacturing Company, plaintiff in error, ag'st Acme Flexible Clasp Company, defendant in error.—Bond.—A. G. N. Vermilya, attorney for plaintiff in error, 5 & 7 Beekman St., New York city.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the sureties under oath, touching their assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. circuit judge, U. S. circuit court.—Filed Jan. 10, 1901.—John A. Shields, clerk.

42 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to the Acme Flexible Clasp Company, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 22d day of January, 1901, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Cary Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this tenth day of January, in the year of our Lord one thousand nine hundred and one, and of the Independence of these United States the one hundred and twenty-fifth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals for the second circuit.—Cary Manufacturing Company, plaintiff in error, *vs.* Acme Flexible Clasp Company, defendant in error.—Citation.—A. G. N. Vermilya, attorney for plaintiff in error.—Due service of the within citation and of a copy thereof this 10th day of Jan'y, 1901, is hereby admitted.—Wm. A. Redding, attorney for defendant in error.—U. S. circuit court.—Filed Jan. 10, 1901.—John A. Shields, clerk.

43 United States Circuit Court of Appeals for the Second Circuit, October Term, 1900.

Submitted March 13, 1901; decided May 14, 1901.

THE CARY MANUFACTURING COMPANY, Plaintiff in Error, vs. THE ACME FLEXIBLE CLASP COMPANY, Defendant in Error. } No. 144. Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace and Shipman.

This is a writ of error by the defendant below to review a judgment of the circuit court for the southern district of New York, which imposed a fine of $2,000 upon the defendant for a violation of an injunction by that court against an infringement of letters patent, No. 314,204, dated March 17, 1885, issued to William O. Swett for a staple-fastener for wooden vessels.

Per Curiam:

This court, upon the appeal of the Cary Manufacturing Company, affirmed a decree of the circuit court for the southern district of New York, wherein upon a bill in equity brought by The Acme Flexible Clasp Company the Cary Company was adjudged to have infringed the Swett patent. (101 *Fed. Rep.*, 269.) In the opinion the patented fastener was said to be a "fastener having two tapered or pointed shanks at the ends of an integral thin connecting strip, the connecting strip being in such form and so proportioned as to bend readily in use, and without such elasticity as to tend to draw the
44 shanks from the wood; the metal of the fastener, at the points of junction of the connecting strip with the shank, being sufficiently heavy to receive the force by which the shanks are driven into the wood of a package in use."

The defendant was making and selling a fastener which had tapered and pointed shanks at the ends of an integral connected strip which had been thinned and then split longitudinally.

An injunction was thereupon issued, and proceedings in contempt were subsequently commenced by the Acme Company to punish the alleged violation of the order.

The defendant is openly manufacturing and selling staple-fasteners, but says that they are made in accordance with the expired letters patent No. 88,501, dated March 30, 1869, to Purches Miles for an improved curtain and carpet fastener, which consisted in a tack and binder formed of two penetreting points at or near the ends of a clamping bar of the same material with the tacks, and flattened so as to hold the fabric securely along an extended surface. The bar is said in the specification to have been flattened and made slightly concave on the under side so as to be stiff and at the same time clamp the curtain or carpet. It is manifest that it was not intended that the clamping bar of the Miles fastener should be bent around the edge of a wooden vessel, but the intent was that it should

be stiff and clamp the surface of the fabric. The connecting strip of the defendant's new staple is thin enough to be flexible, although not as flexible as its predecessors, and is bent and used for the same purpose. By what means the Miles rigid fastener has been made to become the staple which takes the place and answers the purpose of the original infringing staple, we are not advised, but the result is apparent.

The defendant after knowledge that the injunction had been issued, did not cease the publication of its former advertisements, which exhibited the "split fastener," or the circulation of postal cards having the picture of the same device. It says that before the injunction was issued it had previously made a contract with
45 several periodicals for a year's advertising, that the advertisement as prepared included a picture of the split fastener and therefore, that the further publication was not the act of the defendant, but it did not change or take steps to alter the advertisement and it continued to circulate the old postal cards. An additional defense is that the injunction prohibited selling the fastener but did not prohibit offering it for sale. These advertisements and postal cards showed a careless disregard of the spirit of the order. If they had stood alone, the acts would very likely not have been visited with punishment, but, coupled with the sales of the new fastener, they indicated an intent which was not inconsistent with innocence.

The part of the judgment of the circuit court which directed a payment by the clerk to the complainant of one-half of the fine is objected to.

The power of the circuit court to direct the payment of a part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been often recognized in the circuit courts, especially in this circuit, and in practice, is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise. *In re Muller*, (7 *Blatchf.*, 23); *Macaulay v. White Sewing Machine Co.*, (9 *Fed. Rep.*, 698); *In re Tift*, (11 *Fed. Rep.*, 463); *In re North Bloomfield Gravel Min. Co.*, (27 *Fed. Rep.*, 965); *Wells Fargo & Co. v. Oregon R. & N. Co.* (19 *Fed Rep.*, 20).

The judgment of the circuit court is affirmed without costs.

A. G. N. Vermilya, for the plaintiff in error.
Albert M. Austin, for the defendant in error.

46 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court-rooms in the Post-office building in the city of New York, on the 24th day of May one thousand nine hundred and one.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, circuit judges.

THE CARY MANUFACTURING COMPANY, Plaintiff in Error,
vs.
THE ACME FLEXIBLE CLASP COMPANY, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said circuit court be and it hereby is affirmed without costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

N. S.

47 Endorsed: United States circuit court of appeals, second circuit. Cary Manufacturing Company *vs.* Acme Flexible Clasp Co. Order for mandate. United States circuit court of appeals, second circuit. Filed May 28, 1901. William Parkin, clerk.

48 Supreme Court of the United States.

CARY MANUFACTURING COMPANY, Plaintiff in Error,
against
ACME FLEXIBLE CLASP COMPANY, Defendant in Error.
} Assignment of Errors.

And now comes The Cary Manufacturing Company, plaintiff in error, and by its counsel, and respectfully represents that it feels itself to be aggrieved by the proceedings and judgment in the above-entitled cause in the United — circuit court of appeals for the second circuit, wherein a judgment and order was entered May 28" 1901, affirming a judgment of the United States circuit court for the southern district of New York, entered November 16th 1900, and by said judgment of said U. S. circuit court, and says that in the record and proceedings therein and in said judgments and orders, all and singular, there is manifest error in overruling each and every of the assignments of error of this plaintiff in error, forming part of the record in said action before the said U. S. circuit court of appeals, to which assignments, all and singular, it begs leave to refer without repetition thereof, and particularly that there is manifest error therein in that said U. S. circuit court of appeals has and said U. S. circuit court has, contrary to the Constitution of the United States and without due process of law, directed that the plaintiff in error herein be deprived of its property.

49 And in that said U. S. circuit court of appeals has and said U. S. circuit court has, contrary to the Constitution of the United States, and without due process of law, awarded the property of the plaintiff in error to the defendant in error.

Wherefore, the said Cary Manufacturing Company, plaintiff in error as aforesaid, respectfully prays that the errors above assigned be examined and corrected by this honorable court and that the judgments and orders entered herein by the said U. S. circuit court of appeals and the said U. S. circuit court be reversed, annulled, and altogether held for nought, and such other direction had and given as may be just and proper.

Dated, New York May 28" 1901.

CARY MANUFACTURING COMPANY,
By A. G. N. VERMILYA,
Its Attorney and of Counsel.

50 Endorsed: United States Supreme Court. Cary Manufacturing Company against Acme Flexible Clasp Company Assignment of errors &c. A. G. N. Vermilya, attorney for Cary Mfg. Co. Temple court, 5 & 7 Beekman St., New York city. Service of a copy is hereby admitted May 31, 1901 (S'd) William A. Redding attorney for def't in error Filed May 31, 1901. United States circuit court of appeals, second circuit. Filed May 31, 1901. William Parkin, clerk.

51 United States Circuit Court of Appeals for the Second Circuit.

CARY MANUFACTURING COMPANY, Plaintiff in Error,
against
ACME FLEXIBLE CLASP COMPANY, Defendant in Error.

Know all men by these presents, that we, The Cary Manufacturing Company, plaintiff in error, as principal, and Spencer C. Cary and Margaret W. Cary, both of 19 and 21 Roosevelt street, in the city, county and State of New York, as sureties, are severally held and bound unto John A. Shields, clerk of the circuit court of the United States for the southern district of New York, in the sum of four thousand ($4,000) dollars, to be paid to the said John A. Shields, clerk, &c., or to his certain attorney or successors, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our respective seals and dated the 28" day of May, in the year of our Lord one thousand nine hundred and one.

Whereas, the above-named Cary Manufacturing Company is about to or has prosecuted an appeal to the United States Supreme Court to reverse the judgment and order of May 28", 1901, rendered in the above-entitled suit by the judges of the United States circuit court of appeals for the second circuit, affirming a judgment rendered November 16th, 1900, by the judge of the circuit court of the
52 United States for the southern district of New York, by which judgments and orders the defendant was required to pay a fine of two thousand ($2,000) dollars.

Now, therefore, the condition of this obligation is such that if the above-named Cary Manufacturing Company shall prosecute its ap-

peal to effect, and answer all damages, fine and costs, if it should fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Witness our hands and seals this 28″ day of May, A. D. one thousand nine hundred and one.

(S'd) CARY MANUFACTURING CO., [SEAL.]
By S. C. CARY, *Pres't.*
(S'd) SPENCER C. CARY. [SEAL.]
(S'd) MARGARET W. CARY. [SEAL.]

Sealed and delivered in presence of—
(S'd) JAMES A. DONEGAN.

CITY & COUNTY OF NEW YORK, *ss:*

Spencer C. Cary, being duly sworn, says: That he is a resident and householder within the State and city of New York, and worth
53 more than ($8,000) twice the sum specified in the above bond, over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

(S'd) SPENCER C. CARY.

Sworn to before me this 28th day of May, 1901.
(S'd) JAMES A. DONEGAN,
[SEAL.] *Notary Public, New York Co.*

CITY & COUNTY OF NEW YORK, *ss:*

Margaret W. Cary, being duly sworn, says: That she is a resident and freeholder within the State and city of New York, and worth more than ($8,000) twice the amount specified in the above bond, over and above all the debts and liabilities which she owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

(S'd) MARGARET W. CARY.

Sworn to before me this 28th day of May, 1901.
(S'd) JAMES A. DONEGAN,
[SEAL.] *Notary Public, New York Co.*

STATE, CITY AND COUNTY, AND SOUTHERN DISTRICT OF NEW YORK, } *ss:*

I, James A. Donegan, hereby certify that on this 28″ day
54 May one thousand nine hundred and one, before me personally appeared Spencer C. Cary and Margaret W. Cary, each to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the uses and pur-

poses therein mentioned; and the said Spencer C. Cary being by me duly sworn said that he resided in the city of New York, that he was the president of the Cary Manufacturing Company, that he knew the corporate seal of said company and that the seal affixed to the foregoing instrument was the seal of said company and was affixed by order of the board of directors of said company and that he signed the name of the company and his own as president thereof by like order.

(S'd) JAMES A. DONEGAN, [SEAL.]
Notary Public, New York Co.

55 Endorsed: U. S. circuit court of appeals for the second circuit Cary Manufacturing Company against Acme Flexible Clasp Company Bond for damages &c A. G. N. Vermilya, attorney for Cary Mfg. Co. Temple court, 5 & 7 Beekman St., New York city. Approved by (s'd) R. W. Peckham associate justice of the Supreme Court of the United States. Filed May 31, 1901 Service of a copy is hereby admitted May 31, 1901. (S'd) William A. Redding, attorney for def't in error. United States circuit court of appeals, second circuit. Filed May 31, 1901. William Parkin, clerk.

56 Know all men by these presents, that we, the Cary Manufacturing Company, as principal, and Spencer C. Cary and Margaret W. Cary, of 19 & 21 Roosevelt street Borough of Manhattan, New York city, New York, as sureties, are held and firmly bound unto Acme Flexible Clasp Company in the full and just sum of five hundred dollars, to be paid to the said Acme Flexible Clasp Company its successors or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28" day of May, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a stated term of the United States circuit court of appeals, for the second circuit in a suit depending in said court, between The Cary Manufacturing Company, plaintiff in error, and The Acme Flexible Clasp Company, defendant in error, on the 28" day of May, A. D. 1901, a judgment was rendered against the said Cary Manufacturing Company, affirming a judgment of the U. S. circuit court for the southern district of New York, of Nov. 16, 1900 and the said Cary Manufacturing Company, being about to or having *having* obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgments & orders in the aforesaid suit, and a citation directed to the said Acme Flexible Clasp Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, that if the said Cary Manufacturing Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

(S'd) CARY MANUFACTURING CO.,
By S. C. CARY, *Pres't.* [SEAL.]
(S'd) SPENCER C. CARY. [SEAL.]
(S'd) MARGARET W. CARY. [SEAL.]

Sealed and delivered in presence of—
(S'd) JAMES A. DONEGAN.

Approved by—
(S'd) R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

57 Endorsed: United States Supreme Court Cary Manufacturing Company against Acme Flexible Clasp Company Bond for costs A. G. S. Vermilya, attorney for Cary Mfg. Co., Temple court, 5 & 7 Beekman St., New York city. Service of a copy is hereby admitted. May 31, 1901 (S'd) William A. Redding, attorney for def't in error. Filed May 31, 1901. United States circuit court of appeals, second circuit. Filed May 31, 1901. William Parkin, clerk.

58 CITY AND COUNTY OF NEW YORK, *ss:*

Spencer C. Cary, being duly sworn, says:
That he is a resident and householder within the State and city of New York and worth more than ($1,000) one thousand dollars, twice the sum specified in the above bond, over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

(S'd) SPENCER C. CARY.

Sworn to before me, this 28th day of May, 1901.
(S'd) JAMES A. DONEGAN,
[SEAL.] *Notary Public, New York Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

Margaret W. Cary, being duly sworn, says:
That she is a resident and freeholder within the State and city of New York, and worth more than ($1,000) one thousand dollars, twice the amount specified in the above bond, over and above all her debts and liabilities which she owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

(S'd) MARGARET WIER CARY.

Sworn to before me, this 28th day of May, 1901.
(S'd) JAMES A. DONEGAN,
[SEAL.] *Notary Public, New York Co.*

STATE, CITY, COUNTY AND SOUTHERN DISTRICT OF NEW YORK, } ss:

59 I, James A. Donegan, hereby certify that on this 28th day of May, one thousand nine hundred and one, before me personally appeared Spencer C. Cary and Margaret W. Cary, each to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same, for the uses and purposes therein mentioned; and the said Spencer C. Cary being by me duly sworn, said that he resided in the city of New York, that he was the president of the Cary Manufacturing Company, that he knew the corporate seal of said company, that the seal affixed to the foregoing instrument was the seal of said company, and was affixed by the order of the board of directors of said company, and that he signed the name of the company, and his own as president thereof, by like order.

(Sd) JAMES A. DONEGAN,
[SEAL.] *Notary Public, New York Co.*

60 UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 59 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Cary Manufacturing Company, plaintiff in error, against Acme Flexible Clasp Company, defendant in error, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 3rd day of June, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-fifth.

WM. PARKIN, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled 6, 3, '01. W. P., cl'k. }

61 UNITED STATES OF AMERICA, ss:

To the Acme Flexible Clasp Company Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the second circuit wherein The Cary Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be,

why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 29th day of May, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

62 [Endorsed:] United States Supreme court. Cary Manufacturing Company against Acme Flexible Clasp Company. Citation. A. G. N. Vermilya, attorney for Cary Mfg. Co., Temple court, 5 & 7 Beekman St., New York city. May 31, 1901. William A. Redding, attorney for def't in error. United States circuit court of appeals, second circuit. Orig. filed May 31, 1901. William Parkin, clerk.

Endorsed on cover: File No. 18,209. U. S. C. C. of appeals, 2nd circuit. Term No., 122. The Cary Manufacturing Company, plaintiff in error, *vs.* The Acme Flexible Clasp Company. Filed June 26", 1901.

No. 122.

FILED
NOV 26 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Vermilya for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 122.

Filed Nov. 26, 902.

CARY MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

ACME FLEXIBLE CLASP COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

A. G. N. VERMILYA,
Counsel for Plaintiff in Error.

APPEAL PRINTING CO., 12-16 Vesey Street, N. Y.

United States Supreme Court.

CARY MANUFACTURING COMPANY,
Plaintiff in Error.

against

ACME FLEXIBLE CLASP COMPANY,
Defendant in Error.

October Term, 1902,
No. 122.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of Fact.

This is a writ of error, bringing up for review a judgment of the U. S. Circuit Court of Appeals for the Second Circuit, entered May 28, 1901, and a judgment of the U. S. Circuit for the Southern District of New York, entered November 16, 1900, adjudging the Cary Manufacturing Company guilty of contempt and imposing a fine of $2,000, of which $1000 was to be paid to the Acme Flexible Clasp Company, which was thereby affirmed.

The Acme Flexible Clasp Company brought suit against the Cary Manufacturing Company for alleged infringement of U. S. Letters Patent

No. 314,204, granted to W. O. Swett, on March 17, 1885, for a "Staple Fastener" for wooden vessels.

The article alleged to infringe was a certain "Split Clasp" theretofore made by the Cary Manufacturing Company.

The decree adjudging that patent 314,204 valid and delaring that the said "split clasp" infringed it, was entered December 22nd, 1899, and the opinion (previously handed down) is found in 96 F. R., at page 344.

The injunction was issued December 29th, 1899, but was not served before January 3rd, 1900. In fact it never was legally served.

Defendant appealed from the said decree of December 22nd, 1899, on January 13th, 1900.

The appeal was heard by this Court, February 27th, 1900, the decree was affirmed and the opinion then rendered is reported in 101 F. R., page 269.

In April, 1900, the complainant moved to punish the defendant for contempt but that motion was denied.

The "split clasp" was the only one of defendant's manufacture which was claimed to infringe and the only one before the Court, which was claimed to be an infringement.

Thereafter defendant began to make a "concave clasp" which, as it claims and as it fully believes, is just such a device as is set forth in U. S. Letters Patent 88,501, issued to Purches Miles, March 30, 1869—more than fifteen years before the application for the patent in suit was filed.

This patent 88,501 was not in the record on the final hearing aforesaid and the motion to open the case and permit it to be introduced was denied, otherwise it is fully believed the decree would have been the other way.

Be that as it may, the patent 314,204 was sus-

tained and defendant has absolutely ceased to make, use or sell the "split clasp" declared to infringe.

Defendant's manufacture of "concave clasps" was openly conducted—indeed in April, 1900, (see fol. 49) in its answering affidavit—used on the hearing of the first motion to punish for contempt, it declared its intention to make such clasps and such declaration elicited no condemnation either from the court or the complainant.

It was therefore confirmed in its opinion that such manufacture was entirely legitimate, and warranted for the reason that said "concave clasps" did not infringe patent 314,204 and did not come within the limits of the prohibition contained in the injunction, and it proceeded to make and sell them to a limited extent.

Shortly after defendant began to sell said "concave clasps" complainant moved to punish it for contempt for so doing, but up to that time no decision had ever been rendered declaring that "concave clasps" infringed patent 314,204.

Complainant also alleged in its moving papers that since the issue of the injunction, defendant had published certain advertisements *of the "split clasp"* and had used certain postal cards bearing a cut of said "split clasp" upon them.

The cards have been used by it and, *under contract previously made*, the advertisements have been published. Substantially similar cards and advertisements were before the Court in April when it denied the motion as aforesaid.

But in November, 1900, the Court declared the disobedience clear and its decision is embodied in the decree of November 16th, 1900, adjudging defendant guilty of contempt, in that it made and sold "concave clasps" like Exhibits B, D, D, and E, and advertised and offered for sale clasps like

those before the Court when the injunction was granted "split clasps" and a fine of $2,000 was imposed, one-half to the complainant.

On January 10, 1901, the Cary Manufacturing Company sued out a writ of error to bring up to the U. S. Circuit Court of Appeals in the Second Circuit for review, that judgment of November 16, 1900.

Said writ was duly filed and the cause came on for hearing.

It was duly heard, and on May 24, 1901, it was affirmed, and the order, judgment and decree to that effect was duly filed May 28, 1901.

Thereupon on May 29th, 1901, the plaintiff in error sued out a Writ of Error to bring up the cause for review in this court. A citation was also issued, an assignment of error and a bond duly filed and all duly served on the defendant in error.

The entire record was duly filed in this Court, June 26th, 1901, and the matter now comes before the Court for determination.

Errors.

The errors on which reliance are placed are:

First. That the said judgment awards the property of plaintiff in error to defendant in error without due process of law and therefore contrary to the constitution of the United States of America (p. 30, fol. 49, see also 27, p. 24).

Second. That said judgment directs the plaintiff in error be deprived of its property without due process of law and therefore contrary to the constitution of the United States of America (p. 30, fol. 49, see also 26, p 24).

Third. That the fine is excessive and therefore

contrary to the constitution in that it is a cruel and unusual punishment and therefore an infraction of a constitutional provision (35 on page 25 repeated at page 30, fol. 48).

Fourth. That the alleged violation took place long after the injunction ceased to have force (see 33, p. 25 and p. 30, fol. 48.

Many other errors are assigned and we shall present them, but the main reliance is upon those named, though it is submitted that the error committed in holding plaintiff in error guilty of contempt when its manufacture was strictly in conformity to a long expired patent is particularly harmful, and should induce this Court to be astute in finding sufficient cause to relieve the plaintiff from the burden imposed by said error, especially in view of the fact that in Worden vs. Searls, 121 U. S. 14, it declared:

> "§ 725 does not make the action of the "Circuit Court such a matter of descretion "that the orders imposing the fines are not "reviewable,"

and it then reversed the order declaring the Wordens guilty of contempt and imposing a fine, because *in its opinion* the order ought not to have been made.

Due Process of Law.

That all judgments are void unless founded on due process of law and that the constitution so provides, is so well settled that it will not be discussed here. But our first inquiry may be well directed to a consideration of what is "due process of law."

It has been many times defined and some of the definitions are quoted:

1. "The ordinary mode of judicial proceedings."

A. & E. Ency. of Law, p. 292.

2. "The general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

Dartmouth College vs. Woodward, 4 Wheat (U. S.), 518.

3. "A course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

Pennoyer vs. Neff, 95 U. S., 733.

4. Due process of law is such proceeding as secures to everyone the right to have notice of any proceeding by which his rights of life, liberty or property may be affected.

Griswold College vs. Davenport, 65 Iowa, 633.

5. It refers to fundamental rights. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property then the deprivation has not been by due process of law.

Brown vs. Board, 50 Miss., 468

6 "The opportunity to defend must not be merely colorable and illusory."

Happy v. Mosher, 48 N. Y., 313.

7 "His trial must proceed according to estab-

lished procedure consisting of rules of pleading and practice."

State, 28 Bates, 14 *Utah.*, 293.

8 "The definition of the offense and the *authority for every step in the trial* must be found in the law of the land, *idem.*

9 A pre-existing rule of conduct.

Atchinson v. Baty, 6 Neb.,37.

Now turn to the record. Can we find that there was due process of law in the particular under discussion?

The decision (page 29, fol 45) says the power to direct payment to the complaining party has often been recognized and ought to be exercised

> "When the expenses and trouble to which the complainant has been subjected justify its exercise."

Admit that, if you please, where is there a scintilla of proof that the Acme Co. was subjected to expense and trouble in any definite amount. It may have been within the power of the Court to reimburse the injured party, but it can only do so on allegation and proof of loss or expense and of the extent thereof. It has no right to take one person's property and give it to another without any basis for determining the justice of such a transfer.

Such a matter to come within purview of "due process of law" requires proof and that the other party may be prepared to meet such proof, it requires definite allegation, as declared in citations 7 and 8, *supra.* It is a fundamental rule of all legal procedure, that there must be a pleading def-

initely setting forth the claim, and proof substantiating the pleading.

Is there any such allegation? By no means. The sole statement on that point is found at page 9:

> "Affiant states that the benefits which should "come to complainant by the injunction of "this Court are practically nullified by reason "of the manufacture of Exhibit D so nearly "resembling the patented structure as not to "be distinguishable therefrom."

That may be considered the allegation. Is it definite? Does it anywhere state how much it is injured? Does it anywhere set forth a single expense it has been caused? Does it even allege what those benefits are? Not once. If taken as true and if the Court had declared it true. If the Cary M'fg Co. had not even answered it, no Court and no Judge could in that statement find any basis for an award of more than nominal damage or loss of benefit.

There are cases where the selling by one party of the patented goods has caused the other great expense and trouble, a damage of hundreds of thousands of dollars. There are others and their name is multitude, in which the declaration has been made and sustained on appeal that the only damage that could be found was nominal.

Does this allegation furnish any basis for determining to which class it belongs? To say that on such an allegation, even undenied, the Court may of its own volition award to the complaining party a given sum, more than nominal, is to say that if it should *feel* that the expense and trouble amounted to $1 000 00 it could so award and no one

could be heard to the contrary.

Would that be due process of law? Not even the Acme counsel would claim it was. And yet a decision that an award of $1,000, or even $1 on such an allegation is awarded by "due process of law" is just as faulty as though the amount were the $100,000.

But proceed, do the proofs supply the deficiencies of the pleading? No.

The proofs, even accepting the complaining party's statements as conclusively established, are that the Cary Mfg. Co., sold 100 pounds. There is no price given. It could not exceed $10. in gross, and common knowledge would establish that the net result could not be more than $3 or $4 at most. No other sale is named. Manufacture, which is what is alleged at page 9, has been held to only constitute a basis for nominal damage. Whittemore vs. Cutter, 1 Gallison 483; Carter v. Baker, 4 Fisher, 419; so we are left to the sale for proof of loss, but that is equally unsatisfactory as a basis for a definite conclusion.

Passing the fact that the purchase was probably made at the instance of the Acme Co., that it might claim there had been a violation; it proves nothing as to trouble or expense. Mott does not say that he bought a pound less from the Acme, because of the sale. Indeed his statement contradicts its allegation, for instead of not being distinguishable from the Acme make, they differed so much that Mott knew it at once and notified the Acme Co. And this emphasizes the fact that that sale in no sense proves that the Acme Co. was put to trouble or expense thereby. No valid basis for awarding a single dollar to the Acme Co. is furnished and that award is as much without due process of law as though it had been a million. If

it had been a million, everyone would at once admit that it was made without due process of law.

But its size is not the criterion. The question is this, was notice given that a claim for any such amount for trouble and expense would be made? The answer must be—no.

Plaintiff in error was, therefore, not called upon to prepare to meet any such claim, and not being called upon, no unfavorable inference could be drawn if it had failed to meet such a claim, and no judgment against it for any such amount was warranted.

But we go further, was there any proof of trouble and expense to any such or any amount. As already shown there was no proof accepted or offered on the part of the Acme, which by the broadest possible construction could in the slightest degree support such a contention. This is not a case where there are oral pleadings, where it must be concluded that the matter was pleaded and proven. The entire record of what was alleged, what proofs were offered to support the allegations and what was shown in defense is here. If the required allegations are not found in the record or the proof is wanting therefrom, it is because there was no such allegation and no such proof. (Be recited p 21 lines 22-27)

Many cases have been reversed on that very ground, that the case presents no proof to sustain the judgment and that must be the conclusion here. The case is absolutely bare of anything that can be so considered, and we must conclude that the award of $1,000 to the Acme Co. was a bald gift (unwarrantable in itself) and made without due process of law, both in that there was failure of pleading and failure of proof to sustain it, and it was therefore *wholly* unwarranted.

It must be remembered that while called a criminal matter, this cause partakes much of a civil character.

> "When a person fails or refuses to do some-
> "thing which he has been ordered to do
> "for the benefit of the opposing party to the
> "cause, the punishment * * * when by
> "fine is usually for the purpose of having it
> "go to the opposite party as an indemnity."

> "In one class are grouped cases whose occas-
> "sion is an injury or wrong done to a party.
> " * * * In these cases the authority is
> "exerted in his behalf and the fine imposed is
> "measured by his loss."

People vs. Oyer & T. Ct., 107, N.Y., 245.

We find therefore that the loss of the complaining party is indissolubly connected with the amount of fine imposed It is with the trouble and expense to said party in mind, that the Court determines what the fine shall be, and that undeniable and inevitable connection, results in this, that the conclusion of the Court on that point pervades and permeates the entire judgment If that conclusion be reached "without due process of law" the error vitiates the entire conclusion and the judgment as a whole is tainted with the error.

When the Court, without due process of law decided to award $1000 to the Acme Co., solely on the basis of the allegation that the benefits of the injunction are nullified by the Cary Co's manufacture, and without any proof of the value of that benefit and without either allegation or proof of trouble or expense, it introduced a false factor into the

decision which as truly rendered it wholly erroneous as would a mathematician who multiplied by, 10 when 1 was the proper factor.

We repeat, therefore, that not only was the award to the Acme Co. without due process of law, but that the entire judgment is likewise faulty because based upon this unwarrantable conclusion, reached "*without due process of law*" and it must all fall together.

Excessive Amount.

This point has been to some extent investigated in the discussion already had, but to present it more clearly, attention is called to the opinion of Mr. Justice H. B. Brown, rendered in the Searls vs. Worden contempt case and now a part of the record in Worden vs. Searls 121 U. S., 14.

There, there had been a reference and the master, on proof taken, reported a definite amount as defendant's profit arising from the violation and a definite amount as his expenses and his counsel fees. The Justice declared the punishment should bear some just proportion to the magnitude of the offense and added,

> "If, for instance, the master had reported "defendant's profits at only five dollars, the "imposition of a fine of $1,500 for expenses "and counsel fees would seem not only an un- "warrantable encouragement of proceeding of "this nature, but a possible *infraction* of the "constitutional provision against cruel and "unusual punishments."

Apply that to the present case. If a fine of $1,500 imposed in a case of clear violation for selling the

identical thing enjoined, would be unconstitutional, how much more so is a fine of $2,000, when, there is neither allegation nor proof of profit to the Cary Co. and no proof whatever, and hardly an allegation of loss to the Acme Co., certainly neither allegation nor proof of trouble or expense.

If cruel and unusual could be applied by Mr Justice Brown to such a conclusion as he mentioned, its application to the conclusion of the Court in the present case is more than pertinent and the judgment is open to that objection also.

Erroneous Procedure.

As already stated each step must be in exact accordance with prescribed rules.

What took place? Notice was served that a motion would be made to commit and punish, and affidavits were annexed. The Cary Co. replied to those affidavits.

What are the rules prescribed in such cases? These:

The Court shall first in a proper manner determine whether the accused is guilty of the contempt charged and then, have the delinquent brought before it. Then comes the question of penalty and **with him present** it must impose the penalty.

Jackson vs. Smith, 5 Johns., 115.
Moller vs. Smithhurst, 2 Sanford, 724.

In People vs. Nevins, 1 Hill, 154, it is held that the *presence in Court* of the person charged is essential to the jurisdiction of the Court to punish for contempt.

This is called a criminal matter and it is well settled that in such matters

the accused must be present when sentence is pronounced.

That course was not followed here. If it had been, this grievous error would not have been committed. The culprit would have had an opportunity to show the Court how little injury had been done and any extenuating circumstances.

The hearing had, was on the question of whether there was a violation. There was none on the question of the extent of the Acme injury or its trouble or expense, and the accused was not present when the sentence was announced.

The motion was noticed for Nov. 2, 1900, (see notice folio 5). It was argued (folio 21)

. . . . . The decision was made and sentence pronounced—in writing—filed November 12, 1900, (p. 21 top) with neither party present.

Thereupon that sentence was embodied in the judgment of November 16, 1900, (p. 21), and again the accused was absent, and error 26 (p. 24) repeated p. 30 with additions, is directed to this fault.

Tinker vs. Crooke, 22 Han. 579, is a case where the Court ordered the payment of money before a certain time, and in default thereof that the party should pay a fine and stand committed, &c., but the Appellate Court held that the imposing of the fine was error, because the Court below *had not proceeded regularly* by attachment' and it was set aside.

These cases show some of the steps required by "due process of law," and the record fails to show that such steps were taken, and for this error as well the judgment should be set aside.

It is true that Courts must possess the power to punish an infraction of their orders, but it is also true that in doing so they should be

more than usually careful to safeguard, even against themselves, the rights of the party alleged to offend.

They are both judge and jury, they are necessarily influenced by the declaration that their authority has been contemned. They should therefore leave no possible ground even for a feeling on the part of the party charged with fault, that in the effort to sustain its dignity and authority, the Court has overridden his rights even in the smallest particular.

Not only must full opportunity to be heard be given, but, as heretofore noted, each step must be fully authorized and each step must be taken in accord with the greatest particularity. The pleading to be answered must conform to the nicest and strictest practice, the proof must support that pleading in all its particularity, the decision must be founded on that proof and in no jot or tittle should it extend over the foundation. In short the judgment must be a complete structure founded on a substantial basis with not a post or girder missing. So strongly is this insisted on that our best text writers assert that even when the contempt is in the actual presence of the Court, the proceeding to punish ought to be founded on a verified and detailed information duly filed.

Here we have no pleading, giving in detail the matters mentioned, and more fatal yet, we have no proof and the sentence was pronounced in the absence of the accused.

The dignity of a Court is not to be sustained on such a judgment, rendered on such proceedings.

The Case.

It may be well to inquire somewhat as to the merits of the case itself, independent of the errors already pointed out, since they inevitably have some bearing on the Court's attitude toward those errors; and here it may be noted that the Cary Co. certainly believed it was making a device fully described in the Miles patent which *expired* barely a year after the Swett patent was granted, and more than 14 years before the date of the alleged violation.

Consider the situation a case heard, a patent sustained, a *split* clasp declared to infringe, and the judgment sustained on appeal. The party ceases to make that absolutely. He makes another, a Chinese copy of a device patented 31 years before and yet on affidavits merely that device is swept within the purview of the injunction and it is declared that the party has no redress and cannot even go beyond that determination. Thus a question of infringement is really determined without due process of law, for if they be right no way of testing it is available. This cannot be true. But let us see.

What does Patent 314,204 cover?

This patent is an exceedingly narrow one, as is shown in the opinion rendered (101 F. R., p. 269).

The claim speaks of a fastener formed of a single piece of metal with shanks and a thin metal plate, and the article shown (of record in the original cause) is a staple fastener made of round wire having two sharpened prongs at substantially right angles to the connecting strip, which connecting strip has been flattened out thin.

But we cannot therefore assume that every

staple fastener with sharpened prongs and a thin connecting plate is within the terms of said patent.

Cary's so called "skeleton clasp" shown in patent 546,840 already of record, has all those features, but even the Acme expert declared said "skeleton clasp" was not within the patent 314,204 because it was weakened along its middle portion *by cutting out a portion of the stock* (Former record, p. 52, fol. 156).

A mere reduction in the resistance against flexure of the metal at the middle portion would therefore appear to be insufficient to bring a fastener within the Acme lines. If one whittles down a plain clasp (such for instance as figure 3 of Cary's patent 180,198) he does not make the Swett clasp even though he reduces the metal and the spring of the middle portion.

Moore's clasp, pleaded as an anticipation, was of metal (tin) so thin as to be without the objectionable elasticity, but it was held not to anticipate, so that mere lack of elasticity is not the determining feature.

In one of the prior patents, applied for in 1883, in evidence on the final hearing and of record in this Court, it is recited that:

> "In fasteners made of one piece of wire "having its ends sharpened * * * **the "wire must necessarily be soft** *for "the purpose of bending it over the edges of "the parts to be connected.*"

So that fasteners of wire in one piece with the connecting strip so soft as to present no objectionable spring, were old in 1883.

We must look further to discover Swett's invention.

His patent (lines 77 80) says:

> "I claim that a staple fastener with any form of *reduced metal at the middle* portion of the bar A would be my invention *providing the spring* of the metal *was reduced* so as not to draw, &c."

Here then are two features the device must possess to be his.

The *metal* must be reduced. The *spring* must be reduced.

If one start with a metal having spring and reduce the metal *without reducing the spring*, that article does not come within the terms of the Swett patent.

If one start with a metal having no spring and merely reduce the metal, he has not trespassed on Swett's ground.

If one leave the metal in its original form and *merely reduce the spring* he is equally guiltless.

Unless the reduction of metal and reduction of spring are coincident and dependent, the especial thing Swett claims to have devised is not done, and the patent he secured is not infringed.

The reason for such limitations to the boundaries of Swett's invention are manifest.

If 314,204 be held to include all clasps in which the metal has no objectionable spring, it would be anticipated by those cited as old in 1883.

If Swett claimed all clasps having the *metal reduced*, he would be at once met by Miles patent 88501 of March 30, 1869, and McGill's patent 249858 of November 22, 1881, as complete anticipations.

Indeed the flattened portion of McGill's staple fastener, as shown in Figs. 11 and 12 of his patent, presents so little resistance to flexure that he encloses it in a tube to give it the stiffness he de-

sires at such part. See McGill patent lines 59 to 65.

If he claimed *any* clasped that was *thinned*, on the ground that the change in elasticity to which he refers when he says, *providing the spring was reduced*, is but the natural and obvious result of thinning, he would be met by the same conclusion for Miles distinctly says of the middle portion of his clasp. "This bar *b* is flattened" and his drawing shows that said bar *b* is much thinner than the shank which is not flattened (on which point Mr. McMurray's affidavit varies from the truth). Thus something more than flattening is a *sine qua non* for a Swett clasp.

In the opinion on appeal, his Honor, Judge Lacombe, in speaking of the devices shown in certain prior patents, says:

> "They were not so thinned as to reduce the spring of the metal."

but of the "split clasp" he says:

> "The thinning and splitting make it possible "to bend * * * without leaving * * * "elasticity."

and he held the first did not anticipate (though they were in fact without spring as shown above) because they did not show Swett's invention: which we may call "reduced spring by thinning" and also held the latter infringed because it did present that characteristic. It was the *reduction of spring by thinning* that determined the question.

In lines 66–7 of his patent Swett says that his invention is a fastener of metal *made so thin* that when bent it has practically no spring.

This clearly indicates, as have the previous quotations, that the lessening or *reduction of spring* to which he refers is a lessening or reduction *to be*

produced by the thinning, which must itself be carried to a degree that shall reduce the spring to substantially zero.

"D. Second."

Now let us turn to the sample D, attached to the Cary affidavit, which sample, the decree (fol. 32, p. 21) specifies as one the making of which is declared to be a violation of the injunction, thereby declaring such sample to be an infringement of patent 314,204.

That clasp is identically such a clasp as is set forth in the Miles Patent 88,501. It has two penetrating points standing at right angles or nearly so to the bar that connects them (page 17, lines 3 and 4 from bottom, Miles patent). This bar is flattened and made slightly concave, and is *thereby stiffened*, as experiment proves, as Miles (lines 1 and 2) declares in his patent and as Cary testifies (paragraph 5, p. 14).

This sample, as testified by Mr. Cary, (paragraph 6, p. 16), is made from stock like Exhibit C, by merely flattening and concaving that stock.

Examination proves this very sample to possess more spring than the original stock, as the Court may readily see, and as Mr. Cary testifies (paragraph 3, p. 15). There is no word of testimony or other proof offered to contradict his statement. Indeed it would be idle to offer such for the things themselves conclusively establish that Cary's testimony is true. Contradiction of it is impossible.

This sample is *not* so thin as to have practically no spring. *It has spring.*

The *spring* of the metal is *not reduced*. Whatever thinning has been done has accomplished a result opposite to that accomplished by Swett's thinning. Instead of reducing, it has increased the

spring. To say that this product is within the claim of the Swett patent is to say that a clasp made of the original stock would be within it since if this is "*so thin that it has practically no spring*" the original round stock would come equally within that description for it has less yet of spring. I merely instance this to show what absurdities any construction of the Swett patent which would include this Exhibit D, would carry us, being well satisfied this Court will adopt no such construction but hold as I contend that reduced spring is one of the salient and not to be omitted features of the Swett device, and necessarily an element of his claim.

One of the essential features of the Swett clasp is thus absent from sample D, and when the Court declared the plaintiff in error violated the injunction by making and selling that sample D, it was in error.

An injunction cannot be extended beyond the rights of the complainant.

Byam vs. Eddy, 2 Blatch., 524.

Neither Swett nor the Acme Co., had or has any right to exclude the public from making the Miles clasp or any other of the early ones. This judgment would permit that to be done.

It cannot stand.

The Court imposed a fine of $2,000. A very severe punishment. How much of that fine it apportioned to the various acts of disobedience it specified, is not declared, but since it particularly declared the making and selling of "D second" was an act of disobedience, it must certainly have had that act in mind in fixing the penalty and as it was in error regarding that act, such error vitiates the whole judgment.

"McMurray's D."

The error is not confined to "D second" however.

The other D (which is identical with B and also with E) is also lacking in features essential to the Swett clasp, to any that can be held to come within his claim.

First. Its *thinness* is identical with that of "D second." "D second 'was not *made so thin* as to be without spring, neither was D.' "

Whatever its elasticity or lack of it, it is not so *thin* as to be without it for it is as thick as "D Second."

It is made just as Purches Miles made his clasp "flattened and concaved." This was done with the wire cold.

> "They are formed cold and so are all the "concave clasps; the wire is not heated when "presented to the dies" (folio 25, p. 16).

If then Swett's patent is valid, it must be construed to cover something other than Miles showed or described. This D (B & E) is nothing more than Miles showed and consequently cannot be Swett's clasp.

It would undoubtedly be possible to *so thin* metal that it would prevent little or no resistance to flexure. Thinning it while the wire is hot, as Swett says he does, might accomplish it, or *extreme* thinning might. This very clasp D, if reduced to the thinness of this paper, might come within the class, but that has not been done.

It has only been thinned to exactly the same degree as "D second," and by the same dies (p. 15). Comparison of "D second" with the stock from

which it was made shows its thinning *increased* its elasticity. The laws of nature do not change—the same result must have followed the same thinning in the case of D (B & E), and it did.

Ordinary knowledge of the working of metals (here declared and corroborated by the testimony of Mr. Cary) establishes the fact that thinning by pressure of metal between dies (unless continued until extreme tenuity is reached, which was not done with either D, D, B or E) does not remove spring but increases it. That is, it hardens and stiffens the metal, especially when as in the case of D, D, B & E, such metal is concaved as well as thinned.

Miles himself declared this in his patent and no one has denied the accuracy of his statement, nor has there been any denial of Cary's statement that the flattening and concaving which defendant has done, increased the stiffness and spring of the material it operated upon.

McMurray does say that any increase of rigidity produced by the concave convexity of defendant's clasps is nullified, but he does not say the thinning and convexing did not *produce* stiffness and even he is not sufficiently audacious to assert the nullification is by thinning. If it is not done by thinning it is not within Swett's claim and that it is not so done is plainly shown, but defendant asserts that examination shows *the alleged nullification does not exist* and Mr. McMurray's statement in this particular is untrue as it is in several others.

The evidence does not disclose the condition of the stock for this D, when presented to the dies, except that it was cold, but it does disclose the stock for "D second" and its condition:

> "Exactly such stock (part of the same lot) without the slightest change in it, was fed di-

rectly into the machine to produce the concave clasps hereto attached, marked "D" (Cary Afft).

and said "D second" is produced and comparison of the stock and "D second" shows the latter to be the stiffer.

We must therefore conclude the same stiffening occurred with the other D (and B and E.) and that as it fell from the dies, it was more rigid than when introduced between them. It was not *so thinned* by the dies, as to have practically no spring. It has never been thinned since, consequently it is not now *so thin* as to have practically no spring.

Such reduction of spring by thinning is an essential feature of the Swett clasp and D, B & E, as well as "D second" are therefore excluded from the class of Swett clasps.

No matter in what way the Cary Company manufacturers its concave clasps. No matter how it treats the stock, so long as it does not reduce the spring *by* a coincident reduction of thickness it does not infringe the Swett patent.

Mr. Vogel testifies, without contradiction or the assertion of a doubt of his correctness, that he was called upon by the Cary Company to design machinery to produce the Miles clasp, that he did so, that the concave clasp is manufactured by that machinery and is just such a clasp as would be turned out by machinery designed to produce the Miles clasp, not only so but actual experiment made in Court and which may be readily repeated here, shows that D, D, B, & E, are each stiffer than the stock, the round wire, from which they are made. The spring has not been reduced by thinning for it has not been reduced at all. It is increased.

What then is the situation, the Cary Company, with the Miles patent in hand, a patent 15 years old when Swett filed his application, employs a machinist to make machinery to produce that old clasp (which must differ from the Swett, otherwise his patent could not be valid), the machinery is made; the clasps are produced after the Cary Company, with no adverse comment thereon, has declared to the Court and the opposing party its intention so to do; the clasps are just such as machinery made to produce the Miles, would produce; but nevertheless the Acme Company, finding, perhaps, that the Miles is as good as its clasp, at once asks that the Cary Company be punished for what? For making a kind of clasp at least 15 years old when the Acme clasp was conceived; and the lower Court by some misapprehension of fact, or law or both, finds with the Acme Company and declares defendant guilty of disobedience of an injunction against making the Swett clasp.

How can it be guilty of making a Swett clasp when what it made was old years before the Swett was invented?

Mr. McMurray says the Miles is stiff, but Mr. Miles does not say how stiff except that it shall clamp or bind the material into which the tacks are driven. Ocular demonstration in the case of Exhibit E, shows that said exhibit (and it is exactly like McMurray's D and also B) does clamp or bind the material—the shade—to the roller. It holds it all along both edges, a thing the Swett clasp will not do.

E, is therefore exactly like the Miles clasp. It has its other peculiarities—the concavity, which adds some stiffness, the flattening which increases the holding surface and the biting edges along the whole of both sides of the plate, all of which are absent from the Swett, and at the same time it

lacks features of the Swett. Because it is concave it does not project *only about the thickness of tin*, but much more than that, the thickness of the metal and of the depth of the concavity also; and because of its concavity, it is the middle portion and not the ends that are highest. When turned over the Swett rests on its heads. The concave does not, but on the convex portion of the bar. It has no heads as distinct features and these differences emphasize the claim that the concave is not so thin as to be without elasticity, but is the Miles and not the Swett clasp.

To say that the concave is the Swett is to say that the Swett is the Miles; which demonstrates at once the absurdity of the Acme Company's position.

So clear is this that counsel is well satisfied that if the Court had closely examined or actually tested the exhibits before it, it could not have arrived at the conclusion announced, but must perforce have determined and declared as this Court is asked to do, that the concave clasp is not the Swett but the Miles' and the Cary Company in common with the rest of the world was and is at liberty to make it because Miles patent expired more than fourteen years ago.

The lower Court therefore erred not only in declaring "D second" to be within the terms of the Swett patent but likewise erred in the case of "D" and consequently of "B" and "E" and the Cary Company is shown not to have made or sold anything that the injunction prohibited.

Advertising.

The most careful reading possible of the injunction, fails to disclose any inhibition against *advertising*.

It enjoins defendant from *making, constructing,*

using or vending to others to be used, but nowhere mentions advertising.

Defendant insists that the advertisement is nowhere enjoined, and if it had in fact actively caused the advertisement to be published, after the issue of the injunction, that would not have been a violation thereof since that is not prohibited.

It might perhaps have been strongly corroborative of slight proof of making or selling the split clasp, if there were any claim that had been done, but there is no such claim advanced. Nothing but the bald statement of advertising, which certainly presents no ground for the severe punishment the Court below has meted out.

There is no doubt as to the Court's decision on this point. It states clearly that defendant has been guilty of disobedience in that it has advertised.

Only a clear violation of the plain terms of the order should be punished.

Weeks vs. Smith, 3 Abb. Pr., 24.

The facts on this point are indisputable, the terms of the injunction may be read by anyone.

Advertising is nowhere mentioned, nor is anything mentioned that can by any possibility be tortured into a reference, however occult, to anything in the nature of advertising. There is no issue of fact. It is purely one of law.

This is a criminal matter and the indictment is for *violating the injunction*.

Had this issue been tried as indictments are ordinarily tried, all evidence of advertising must have been excluded as being outside the charge; and the Court, even if the evidence had been admitted without objection, would have been obliged

to direct a verdict of not guilty, because, it would have been bound to declare that proof of advertising was no proof of the commission of the crime of violating the injunction.

Since the lower Court refused to do this, it committed an error of law for which this Court must reverse its judgment.

But the facts as detailed fail to even establish that the Cary Company did actually advertise.

It appears from Mr. Cary's sworn statement, which is not denied, that when the injunction issued the company had already made contracts for a year's advertising with several periodicals. These years extended beyond the date of issue of the injunction, but the company gave no further order for advertisement. The further publishing of the matter to which objection is made was *not the act of the Company*. It was the act of the respective publishers performing contracts made before the injunction issued. The Cary Company took no part in it. It thereafter made no such contract and gave out no such matter.

It was no more guilty of advertising, after the issue of the injunction, than though it had previously had the advertisement painted on the roof of some barn, and such advertisement had merely remained thereon. Indeed the advertisement named was after its contract expired and purely a voluntary act on the part of the publisher.

Would the Court have punished such an act in the absence of any further act on defendant's part and in the absence too of any direction in the order regarding advertising? Of course not. Neither should it have punished the Cary Company. The respective papers were not under its control. Having made its contracts it had nothing further to do with the advertising. The papers, in order to earn the price paid them, continued of their own motion

to print and publish, and continued it in hope of a further contract which it did not get. The Cary Company did not do it and should not be punished for it.

I would add here, though not specifically in proof, that some and it was believed that all of these advertisements had also the words "Manufacturers of all kinds of Box Straps, Box Corners, etc.," appended to the specific advertising of the "split clasps," as is well known to the Acme Company, and it is to these words Cary refers in his affidavit, in justice to whom it should be said that no copy of the specific advertisement in proof was served with the moving papers.

Postal Cards.

The only other act which can in any way come under the head of advertising was the use of cards bearing a cut of the "Split Clasp" but it will be noticed that those cards (addressed to the Cary Manufacturing Company), bore cuts of other things as well. Mr. Cary states the cards were some of a lot on hand when the injunction issued, and the man who used them—Mr. Battell—distinctly says that he specifically told Mr. Mott, with whom he left such card, that the Cary Manufacturing Company was not selling the "Split Clasp." In view of which, said use of such cards was certainly not an advertisement that the Cary Manufacturing Company longer sold those clasps.

To hold that such use of those cards was a contempt of the order not *to make, use or sell those clasps* is certainly not merely an undue extension of the actual inhibition, but a plain disregard of all law applicable to the subject.

Offering for Sale.

Here again we call attention to the fact that the only acts enjoined were, making, using, selling, and therefore what the defendant (below) did in this regard, comes not within the prohibited acts.

But except the newspaper publishing, which it did not do, be so called, there was not even the act of offering.

Mr. McMurray declared that *customers* informed him that the Cary Manufacturing Company continued to offer said clasps for sale.

His statements must be utterly disregarded. Probably those customers had in mind the advertisements which the newspapers contained. Be that as it may, he does not give the names of his informants; which, under the well-known rule, conclusively demands the statement be disregarded; and furthermore, in opposition, we have the sworn statement of the salesman—Batteil—that he was not provided with the data which he would have needed to offer "Split Clasps" for sale; that he had never been given the sale of those goods and never had offered them for sale and this is supplemented by Mr. Cary's statement that the company in good faith abandoned the sale immediately upon the issue of the injunction and had not sold any since and moreover that he gave strict orders that no more should be made or sold or used.

The burden of proof was on the moving party, but it has presented none and with so full a contradiction, the verdict is so contrary to the proven facts that it must be set aside as contrary to the evidence.

If the Court meant that the advertising is the "offering" to which it refers then we re-assert that

such offering was not done *by the defendant* after the injunction issued and furthermore that it was not enjoined and therefore there could be no contempt in what was done.

The Cary Manufacturing Company has intended to and has obeyed the injunction strictly. It has honestly endeavored to pay the utmost regard to the order. It has even abandoned the use of much costly machinery, which still lies idle and useless on its hands. It has paid the strictest heed to the determination that the Swett patent was valid and that the "split clasp" infringed it and all the incidents attendant thereupon, and the decision that it has been guilty of contempt of court seems almost incredible, opposed as it is both to law and fact. The judgment is clearly error in all its phases, and for such error the judgment must be reversed.

Discretion.

Opposing counsel will undoubtedly assert that decisions in matters of alleged contempts are discretionary, and therefore not to be disturbed on review; but the United States Supreme Court in Worden vs. Searls, 121 U. S., 14, declares the contrary and says:

> "Section 725 does not make the action of the Circuit Court such a matter of discretion that the orders imposing the fines are not reviewable.

Other decisions might be quoted, such as *In re* Butler, 63 U. S. App., 120, and cases there cited, but it is not thought necessary to more than call the attention of the Court to the

fact that it is not now the law that alleged contempts are not reviewable by a higher Court.

People v. Munsell, 101 N. Y., 245.

Injunction not in Force.

The statute provides that if an injunction in the Circuit Court be granted by a District Judge, it shall only remain in force till the next term (R. S. section).

As appears from the record on final hearing the injunction was granted by his Honor Judge Townsend, a District Judge, on December 22, 1899. The next term began long before the alleged disobedience took place. The order does not appear to have ever been continued. The imposition of the fine was therefore unwarranted.

This point is named as a duty of counsel, but will not be elaborated for the reason that it is on the merits that the Cary Manufacturing Company claims to justify its acts. On the well supported contention that though it was not even legally served and though it lapsed, nevertheless the company faithfully observed the injunction of the Court as though properly served and continued in full force to this day.

Writ of Error.

The judgment imposes a penalty, a fine of $2,000, to be paid to the Clerk of the Court, part of it at least to be paid to the United States.

> "When a fine is imposed to be paid to the government it is a criminal judgment."
>
> "Contempt of Court is a specific criminal offense."
>
> "The imposition of the fine was a judgment in a criminal case."
>
> "Error will lie."

Such were the announcements in the Trunk Catch Case, and the Court not only sustained its jurisdiction to review on writ of error but also reversed the order of the lower Court and held there was no contempt."

"If he wilfully disobeyed the order it was a criminal contempt.

People *ex rel* Munsell, 101 N. Y., 245.

Section 6, Federal Appellate Courts Act, reads:

> "That the Circuit Court of Appeals hereby established by this act shall exercise appellate jurisdiction * * * also in all cases arising * * * under the criminal laws."

The conclusion to which the law and the authorities above cited necessarily brings us is plain and not to be mistaken. The judgment of Nov. 16, 1900, imposing a fine to be paid to the government was to that extent a final judgment in a criminal matter, but that judgment involved a denial of constitutional rights; and its consideration involves the construction or application of that constitution and the right to its review as such in this Court by Writ of error is distinctly and clearly provided.

The presence here of the plaintiff in error is fully warranted. It has an inalienable right to the relief it asks, that this Court review the action of the one below.

The errors named are manifest.

The defendant committed no act of contempt. Some of the acts of which it was found guilty it did not commit; some were not prohibited and none that were done were in any sense a disobedience of the Court's orders or a contempt of its authority.

Moreover, and this is the main contention, in

rendering the judgment it did, the Circuit Court, and the Court of Appeals as well, transgressed the plain provisions of the constitution in the particulars named, and the judgments should therefore be reversed.

Respectfully submitted,

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Counsel

for Plaintiff in Error.

Supreme Court of the United States.

No. 122.—October Term, 1902.

The Cary Manufacturing Company, Plaintiff in Error, *vs.* The Acme Flexible Clasp Company.	In error to the United States Circuit Court of Appeals for the Second Circuit.

[January 5, 1903.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

The Acme Flexible Clasp Company brought suit in the Circuit Court of the United States for the Southern District of New York against the Cary Manufacturing Company for alleged infringement of letters patent No. 314,204, granted to W. O. Swett, March 17, 1885, for a staple fastener for wooden vessels, which went to a decree sustaining the validity of the patent and adjudging the Cary Manufacturing Company to have infringed it. 96 Fed. Rep. 344. Defendant appealed to the Circuit Court of Appeals for the Second Circuit and the decree was affirmed. 101 Fed. Rep. 269. Proceedings in contempt were subsequently commenced by the Acme Company to punish the alleged violation of the injunction issued under the decree, and the Circuit Court imposed a fine of $2,000 for contempt, to be paid to the clerk of the court, one-half of the sum to be paid to the Acme Company and one-half to be paid to the United States. The Cary Company sued out a writ of error from the Circuit Court of Appeals to review this judgment, and the judgment was affirmed. 108 Fed. Rep. 873. Thereupon this writ of error was allowed.

It is apparent that the writ of error cannot be maintained, as the judgment of the Circuit Court of Appeals was final. Judgments and decrees of those courts in all cases arising under the patent laws and under the criminal laws are made final by section six of the judiciary act of March 3, 1891. Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under section five of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court. *Robinson* v. *Caldwell*, 165 U. S. 359; *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277; *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290; *Ayers* v. *Polsdorfer*, *ante*, ——.

Writ of error dismissed.